United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

147

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.24,470

David Green, Individually and as
Chairman of the Peace Committee,

Petitioners,

v.

Federal Communications Commission
and United States of America,

Respondents,

National Broadcasting Co., Inc.,

Intervenor

Petition for Review of Order of
the Federal Communications Commission

BRIEF FOR PETITIONER

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MISCELLANEOUS:

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v.

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PETITION FOR REVIEW OF ORDER OF
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BRIEF FOR PETITIONER

JURISDICTION

This brief is submitted in support of petitioner's petition for review of an order of the Federal Communications Commission (hereafter F.C.C." or "Commission") which dismissed without hearing, without opportunity to file responsive pleadings, and without oral argument, a fairness doctrine complaint filed with the Commission against stations WRC-TV and WMAL-TV of Washington, D.C. Petitioner sought time

to respond to the point of view presented on one side of a controversial issue of public importance when military recruitment ads were aired. This Court has jurisdiction of the petition for review pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2344.

STATEMENT OF ISSUES

1. Do military recruitment ads advocate the desirability of regular military service?

2. Is the desirability of military service a controversial issue of public importance?

3. Is unfettered discretion in a Federal Communications Commission licensee to impose a prior restraint on speech consistent with the public interest, convenience, and necessity, and the First and Fifth Amendments to the Constitution?

4. Does it violate the Communications Act of 1934, and the First and Fifth Amendments to the Constitution for a broadcast licensee to bar protected speech from the airwaves?

5. Should this Court reverse the Commission where the Commission has displayed a "curious neutrality" in favor of the licensee and First Amendment rights hang in the balance?

STATEMENT PURSUANT TO RULE 8(d)

This case has not previously been before this Court.

REFERENCE TO RULINGS

The ruling of the F.C.C. that is challenged in this petition for review is a letter-order captioned "In Re Complaint by David C. Green Concerning Fairness Doctrine Re Stations WRC and WMAL", addressed to Albert H. Kramer, counsel for petitioner. It is reported at 24 F.C.C. 2d 171, J.A. 32-36, (June 4, 1970).

Although not formally a part of this appeal, petitioners have also included in the Joint Appendix the opinion of the Commission in San Francisco Women for Peace, The GI Association, The Resistance, 24 F.C.C. 2d 156, J.A. 17-31, (1970). A petition for review of the latter is pending in this Court sub nom. GI Association No. 24,516 (D.C. Cir.). It was treated by both the majority and the dissenting Commissioner as a companion proceeding to the one now here for review. The dissenting opinion of Commissioner Johnson, J.A. 19-31, was also attached as a dissenting opinion to the order which petitioner now seeks to have reviewed and reversed by this Court.

Also included in the Joint Appendix is the Commission's opinion in Alan F. Neckritz, 24 F.C.C. 2d 175, J.A. 37-38, (1970). This order is not a part of this appeal either. But it was also treated by the Commission majority and the dissenting Commissioner as a companion proceeding to petitioner's complaint. A petition for review of the former has been filed in the United States Court of Appeals for the Ninth Circuit. Alan F. Neckritz v. F.C.C., No. 26,335.

STATEMENT OF THE CASE

This case arises under the 'fairness doctrine', Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949), as embodied and adopted by the Congress in Section 315 of the Communications Act of 1934, 47 U.S.C. § 315. Broadly speaking, the fairness doctrine requires "both that the listening public is presented with information regarding controversial issues of public importance, and that facts, analysis, and argument supporting all reasonable positions on a given issue are aired by the broadcasters". Retail Store Employees Union, Local 880 v. F.C.C., No. 22,605 (D.C.Cir. October 27, 1970), slip op. at 17. The constitutional compulsion underlying the fairness doctrine has been explicitly recognized by this Court, Red Lion Broadcasting Co. v. F.C.C., 127 App. D.C. 129, 381 F. 2d 908 (1967), and affirmed by the Supreme Court., 395 U.S. 367 (1969).

Petitioner David Green is Chairman of the Peace Committee of the Baltimore Yearly Meeting of the Religious Society of Friends, a Quaker group. The Baltimore Yearly Meeting is made up of monthly meetings (i.e., local congregations) of Friends throughout this area. It is an established organization with a three-hundred year history of deep pacifist conviction. The activities of the Friends in counselling young men of draft age about alternative service is well known. Throughout their history the Friends have eschewed regular military service */

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*/ Regular military service means accepting the possibility of bearing arms as a phase of one's military service.

as a desirable way of serving one's country. They have maintained, and continue to do so, that there are equally honorable means of serving one's country, both within and without the military, and that the moral, political, social and personal consequences of bearing arms and service in the military are detrimental to the individual.

The Friends have often suffered persecution for their views, but they have always perservered in their efforts to disseminate their beliefs. As the result of these efforts, the legitimacy and sincerity of their beliefs was recognized by Congress as early as 1917. Draft Act of 1917, §4, 40 Stat. 78 (1917).

The Friends, however, have never had a satisfactory forum for adequately disseminating their beliefs. They have listened and watched for years while the United States Government has effectively utilized the mass media machinery to churn forth repetitive and continuous appeals to patriotism and the masculinity of bearing arms in order to entice young men into the military. In an effort to redress this gross imbalance and because of the peculiarly influential role of the broadcast media in reflecting the "desirability" of military service, petitioner wrote letters to WRC-TV, WMAL-TV and WTOP-TV, all of Washington, D.C. Professor Green*/ requested free air time to present information opposing "the claim made by numerous military recruitment advertisements presented on...[each] station that a career in the armed forces is desirable, rewarding, and the best way to serve one's country". J.A. 9. These ads, carried by the stations as public service announcements vary in length from ten to sixty seconds.

*/Mr. Green is a Professor at George Washington University.

After extensive negotiations and some exchange of correspondence with each station, Professor Green, at the request of the stations and under extreme time pressure, had prepared a spot announcement opposing military service. J.A. 10. Each station declined to allow the spot to be shown. WTOP-TV, however, after acknowledging that recruitment ads raise a controversial issue of public importance, offered Professor Green appearances on "prime time" panel shows (Martin Agronsky, then shown week nights at 7 p.m.). In addition, WTOP offered the Friends Peace Committee the opportunity to "participate in a half-hour program which would further explore, in depth, the campaign in which [the Friends] organization is engaged". J.A. 11. Believing that this offer satisfied WTOP's obligations under the fairness doctrine, and that these appearances accorded sufficient opportunity to inform the public of the alternatives to military service, Professor Green accepted this offer.

By contrast, WRC-TV declined to offer Professor Green or the Peace Committee or anyone else time to present opposing viewpoints to the desirability of military service or information regarding alternative service.*/. J.A. 12, 14.**/

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*/The Military Selective Service Act of 1967, 50 U.S.C. App. §451, et seq., provides for alternative service or non-combatant status for conscientious objectors. See footnotes on pp. 11-12, infra.

**/The information referred to in the Commission's decision in this matter, J.A. 34, is inaccurate and is, in any event, not properly before this Court. The Commission states that it was "informally advised that [WRC-TV] has offered Society

(con't)

Instead, WRC-TV misstated the matter at issue--it characterized Professor Green as desiring to present views opposed to the maintenance of the armed forces, a mischaracterization which the Commission mistakenly and without further analysis accepted. J.A. 34. */

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of Friends time to appear on two religious program series on which they would have an opportunity to present their views." J.A. 34. This information apparently came to the Commission in a letter of April 16, 1970, from Howard Monderer, Washington Counsel for National Broadcasting Company (the licensee of WRC-TV) to Margot Polivy, Office of General Counsel of the Commission. J.A. 15. But neither the General Counsel's Office nor Mr. Monderer informed counsel for Mr. Green that this information was presented to the Commission and Petitioner never had an opportunity to respond to this misinformation, though it was regarded as determinative by the Commission, J.A. 35. Petitioner was not even aware that the letter of April 16th existed until the record in this case was delivered to this Court.

In fact, no such offer was proferred by WRC-TV. No such offer appears in the letter to Professor Green. J.A. 14. The only offer made by WRC-TV was an invitation to appear on "Issues" in connection with a religious discussion, not in connection with military service. For the Commission to rely on correspondence in the nature of ex parte contacts to resolve this case is a clear violation of its own rules. Cf. F.C.C. Rules and Regulations, 47 C.F.R. §1.1241; 5 U.S.C. §554. Serious doubts are also raised in terms of Due Process. Cf. Greene v. McElroy, 360 U.S. 504, 507-08 (1959).

In any event, this offer was clearly inadequate to meet WRC-TV's obligations under the fairness doctrine and its obligation to provide suitable information to the public, as was WMAL-TV's offer inadequate. See pp. 29-32, infra.

*/ The desirability of the United States maintaining armed forces at this or any other juncture in our history is totally unrelated to the manner in which those armed forces are raised, i.e., whether by conscription, voluntary enlistment, the hiring of mercenaries, etc.

WMAL-TV also declined to show spot announcements about alternative service. After mischaracterizing the issue raised by the ads as the desirability of the draft (see discussion infra. pp. 11-13) WMAL stated that the topic required more extensive discussion. It disingeneously offered Professor Green an opportunity to appear on its "Outlook" program, J.A. 12, a program it acknowledged did not reach a large audience. J.A. 13, n.4.

Thereupon, Professor Green filed a letter of complaint, dated March 20, 1970, with the Commission and against stations WRC-TV and WMAL-TV. He requested that the Commission order the stations to comply with the fairness doctrine and provide access to the airwaves for information concerning the desirability of military service and suggesting possible alternatiyes. On June 4, 1970, the Commission issued its decision, by way of a letter addressed to counsel for petitioner, denying any relief. J.A. 32.

About four weeks prior to petitioner's filing of his complaint, the Commission received the letter of complaint in San Francisco Women for Peace. The petitioners' in that case sought time to respond to military recruitments ads in the San Francisco Bay Area. The complainants stated that the issue of enlistment in the military, "in large part because of the Vietnam War, has become a highly controversial issue of public importance". Letter of February 16, 1970, from Donald A. Jelinak, Esquire to William B. Ray, Chief, Complaints and Compliance Division of the F.C.C., p. 3. They went on to note that because the draft im-

posed an obligation to serve in the military on every young man, the ads suggested that the best way to fulfill this obligation was by enlistment. Although they stated that the desirability of military service exists as a controversial issue apart from Vietnam, they noted the relationship of military service to the war in Vietnam.

About two weeks later, and about two weeks prior to the filing of Professor Green's complaint, Alan F. Neckritz also filed a letter objecting to the recruitment ads in the San Francisco Bay Area. In his complaint, Mr. Neckritz documented the extent to which military service, either voluntary or involuntary, was a controversial issue of public importance in the San Francisco Bay Area, both as it related to American foreign policy in general and to the Vietnam War in particular. The complaint also contains overtones that question the desirability of military service as a means of advancing one's technical, social, professional, and other skills. Mr. Neckritz claimed that the issue raised by the ads is whether it is desirable to seek exemption and/or deferments from military service.

Although Alan F. Neckritz came much closer to raising the pristine issue of the desirability of bearing arms in the military than did San Francisco Women for Peace, it was still tied in part to the Vietnam War and American foreign policy in general. Petitioner Green's complaint, by contrast, clearly divorced itself from the present or past foreign policy of the United States and the war in Indochina. Nonetheless, the Commission decided all three complaints together, regarding them as raising the same issue; namely, the relationship between the draft and Vietnam and viewpoints opposing

them. In San Francisco Women for Peace, the Commission stated that.

> "[T]he thrust of the complaint is an objection to the use made of the army (war in Vietnam) and the manner in which manpower is conscripted (Selective Service draft)." J.A. 18-19.

In Alan F. Neckritz, the Commission adopted the licensee's determination

> "that armed forces recruitment messages did not raise the issue of the war in Vietnam nor did it (sic) support military involvement in foreign countries. Further, that the recruitment messages advocate only voluntary enlistment and therefore do not raise the issue of selective service draft and do not claim that military enlistment is the sole source of technical training or future success." J.A. 38 (emphasis added).

The Commission likewise declined to disturb the licensee's judgment in petitioner's case even though the judgment reached by the licensees with respect to the issue raised by the military recruitment ads is exactly the opposite of the judgment reached by the licensee in Alan F. Neckritz.

> "[a]lthough [the stations] declined to broadcast the views urged by Professor Green and his group in the form of promotional spot announcements, [they] have offered an opportunity for the presentation of such views in the context of substantive programming. Absent evidence that stations WMAL and WRC have failed in their overall programming to achieve fairness in their coverage of the controversial issue here involved (i.e., the draft), the Commission will not disturb the licensee's determination as to how to best inform the public of the various facets of issues of controversial public importance." J.A. 35 (emphasis added).

ARGUMENT

I. The Military Recruitment Ads Present One Point of View on a Controversial Issue of Public Importance--The Desirability of Bearing Arms

A. Introductory

The disparite results reached by the Commission reflect a failure on its part to differentiate the myraid issues raised by the various complaints and the singular issue raised by petitioner's complaint in particular. Petitioner stated that it wished to provide an opposing point of view to the ads by providing information about alternative service and by opposing the desirability of regular military service. This he proposed to do by providing information about the choices confronting a young man faced with military service. Under the Military Selective Service Act, 50 U.S.C. App. §451 et.seq. there are several lawful choices available:

1. A young man may wait to be drafted and do regular service in the army.
2. He may apply for non-combatant status*/ and wait to be called.
3. He may apply for alternative service**/ and wait to be called.

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*/ Conscientious objectors who oppose only service in a combat role may be granted 1-A-O classifications and serve as a non-combatant. 32 C.F.R. §1622.11.

**/ Conscientious objectors opposing military participation of any kind may be granted 1-O classifications and serve in a civilian capacity. 32 C.F.R. §1600.1.

4. He may enlist in a particular service of his choice for regular service.*/

5. He may choose to enter a deferred or exempt occupation or profession.**/

Petitioner's position is that it is never desirable to enter the military for purposes of bearing arms. Under the present selective service law, choices 2,3, and 5 are legal means of avoiding the requirement that one bear arms in the service of his country. The fact that the present armed forces is partially maintained by the draft is merely an aggravating factor in the debate over the desirability of regular military service. Even were the draft abolished tomorrow, the military would remain and with it would remain all of the undesirable effects on the individual to which petitioner objects. And so if the ads were continued, they would still be urging young men to enlist in the military to bear arms because it is an honorable, desirable, and a socially and personally rewarding way of serving one's country. The opposing point of view would then be, as it is now, that it is not desirable to bear arms because of the detrimental social, moral, and psychological effects of regular military service on the individual.

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*/ As a practical matter, the problem of enlistment for non-combatant service does not generally arise.

**/Registrants may apply for a II-A "critical skill" deferment under 32 C.F.R. s1622.22 or an agricultural deferment under 32 C.F.R. 1622.24(a). The types of skills eligible for II-A status range from airplane pilots to apprentice machinists. The complete list of essential occupations can be found in Local Board Memoranda (LBM) 95 and 105, and Selective Service Operations Bulletin (Ops. Bull.) 338.

It is of course true that hearing these opposing viewpoints probably would have some bearing on whether a man chooses to be drafted (alternative 1) or to enlist (alternative 4) or whether he seeks a 1-O or 1-A-O classification (alternatives 2 or 3). But this does not make the issue posed by an ad advocating regular enlistment into advocacy of the draft; nor does it make the opposing point of view abolition of the draft. Presentation of these choices is neither pro-draft nor anti-draft. They relate solely to the desirability of choosing to serve in the regular military, the subject of the recruitment ads, as opposed to electing an equally lawful and honorable alternative, the opposing viewpoint Professor Green desires to express.

B. The Ads in Question Emphasized the Desirability of Regular Service in the Military

The Commission opened its decision by noting that the complaint was filed in response to recruitment ads. It went on to state that

> "The nub of the issue raised by the complaint is the assertion that coverage of anti-Vietnam activities and sentiments does not deal with the desirability of bearing arms versus the desirability of alternative service. Complaintants specifically note that the issue to which they seek time for response is the 'desirability of regular military service even were there no war raging half a world away' [Vietnam]." J.A. 32 (emphasis added).

The Commission then restated the issue before it as if

> "[T]here is a significant controversy of public importance on whether the United States at this time should maintain armed

> forces, and, what is essentially the same thing, whether persons should volunteer for service in the armed forces." J.A. 34.

Having arrived at this point, the Commission, by some incredible schizophrenia, concluded that the issue raised by the ads was whether there ought to be a draft, J.A. 35, the exact opposite of its conclusion with respect to the same ads when they were presented in Alan F. Neckritz, J.A. 38, supra, p. 10. */

There is no question but that the fairness doctrine applies to ads, Retail Store Employees Union, Local 880 v. F.C.C., No. 22,605 (D.C. Cir. Oct. 27, 1970) slip op. at 20-21; Sam Morris, 11 F.C.C. 197 (1946), and the Commission has recognized this includes advertisements that are public service announcements. J.A. 35. The guidelines for determining the issue raised by these ads were set forth in the landmark case that applied the fairness doctrine to cigarette advertising. WCBS-TV, 9 F.C.C. 2d 921 (1967), aff'd on reh. 10 F.C.C. 2d 161, aff'd sub nom. Banzhaf v. F.C.C., _ App. D.C. ___, 405 F. 2d 1082 (D.C. Cir. 1968),

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*/Apart from its failure to have adopted any guidelines for resolving what message is conveyed by the ads in question, see text immediately following this note, infra, the Commission may have reached this conclusion because it had already muddied its analysis.

In its restatement of the issue, quoting J.A. 34, the Commission dropped the word "regular" which had earlier, supra, p. 13 modified "military service." By so doing, the Commission missed the distinction between the various choices confronting a young man, supra pp.11-12. The petitioner sought to present an opposing point of view to only number 4, i.e., enlistment for regular military service since that is the issue raised by the ads. He was not necessarily opposed to the draft under choices 2 or 3, i.e., non-combatant status or alternative service. see p. 11, supra.

cert. denied, 396 U.S. 842 (1969). The Commission, recognizing the expertise of its sister agency the Federal Trade Commission in assessing advertising, deferred to the F.T.C.'s judgment as to the standard to be applied to the advertisements in question. Television Station WCBS-TV, Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C. 2d 921 (1967).

This standard is the "net impression which the advertisement is likely to make upon the general populace". Charles of the Ritz v. F.T.C. 143 F.2d 676, 679 (2d Cir. 1944). And where the advertisement is directed at a particular group, the impression must be assessed in terms of the advertisements probable impact on that group. Stauffer Labs, Inc. v. F.T.C., 343 F.2d 75, 83 (9th Cir. 1965); Wards Labs, Inc. v. F.T.C., 276 F.2d 952, 954 (2d Cir. 1960); Stanley Laboratories v. F.T.C., 138 F.2d 388, 393 (9th Cir. 1943). And since the concern is with the "general impression" or interpretation, technical or highly analytical constructions are to be avoided if they ignore the general thrust of the ads. Kalwajltys v. F.T.C., 237 F.2d 654 (7th Cir. 1956); Stanley Labs, supra; DDD Corporation v. F.T.C., 125 F.2d 679 (7th Cir. 1942). The standard is not the cautious and skeptical attitude of the "reasonable man" of tort law since allowance must be made for the public's careless and casual habits in listening to and interpreting the ads. Giant Food Inc. v. F.T.C., 61 F.T.C. 326, 346 (1962), aff'd ___ App.D.C. ___, 322 F.2d 977 (1963). This extends to what is reasonably implied by the ads. Aronberg v. F.T.C., 132 F.2d 165, 167 (7th Cir. 1942). Under Banzhaf, supra, the Commission was obligated to apply these guidelines to the ads

in question. Retail Store Employees Union, Local 880 v. F.C.C., No. 22,605 (D.C. Cir. Oct. 27, 1970), slip op. at 20-21. And when this is done, what emerges is an admonition to serve one's country honorably by bearing arms. Cf. dissenting opinion of Commissioner Johnson, J.A. 22.

By touting the desirability of regular military service, the ads in question were not advocating the draft. It is of course true that the draft and the rate of enlistment are related. But as set forth above, supra pp. 11-12, the desirability of bearing arms must be faced in a variety of situations, of which the draft is only one. The situation can also be faced by an enlistee.*/ But the Commission's decision turned only upon whether the draft was a desirable way to be forced to make the decision. With respect to the latter, there may have been balanced coverage (a point to which petitioner shall return, see infra at 32-33). But with respect to the desirability of bearing arms, the Commission was unresponsive to the argument that only one side had been presented. The Commission decided the wrong issue.**/

*/A number of enlistees have applied for in-service conscientious objection, i.e., they became opposed to bearing arms after entering the service. Packard v. Rollins, 307 F. Supp. 1388 (W.D.Mo. 1969); Cooper v. Barker, Civ. No. 19,817 1 SSLR 3289 (D. Md. Oct. 29, 1968); U.S. ex. rel. O'Hare v. Eichstaint, 285 F. Supp. 746 (N.D.Cal. 1967); U.S. ex. rel. Mankiewicz v. Ray, 399 F.2d 900 (2d Cir. 1968). The problem of in-service conscientious objection has even arisen at West Point. U.S. ex. rel. Denham v. Resor. Dkt. No. 70, Civ. 3369 (S.D.N.Y. 9/3/70).

**/The absurdity of the Commission's position is illustrated by moving from the advocacy level to the action level. Under the Commission's reasoning, one should wait to be drafted in order to express his opposition to enlistment. Conversely, one could express his opposition to the draft by enlisting.

C. The Desirability of Service in the Military is a Controversial Issue of Public Importance

The triggering device for the fairness doctrine is a determination that one point of view has been presented on a controversial issue of public importance. Although the exact nature of such an issue cannot be presented succintly for simplistic definition and ready application, under any reasonable criteria -- whether it be the number of persons affected, the amount of money involved, the potential consequences for the individual, the degree of public action, or the extent of the interest of the listening and viewing audience*/ -- the desirability of service in the military is a controversial issue of public importance.

1) The Number of Persons Affected

From 1965 to 1970, 16,552,710 American youths enlisted in the armed forces. Another 2,647,975 were drafted.**/ Decisions about education, employment, career, wedlock, etc., that affect the whole course of a person's life turn on whether he should bear arms. It seems safe to say that with such major decisions for so many hanging in the balance, virtually no American family escape being touched by a decision to bear or not to bear arms. The fact that enlistees outnumber draftees by a ratio of 8 to 1 highlights the absurdity of saying that the draft, but not enlistment, is a controversial issue of public importance.

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*/With respect to the latter, cf. Robert Scott, 11 F.C.C. 372, 376 (1946).

**/Source: OASD (Comptroller) U.S. Dept. of Defense (November 5, 1970).

2) The Amount of Money Involved

The Administration of the Selective Service System cost over $361,195,000 from 1965 to 1970.* The amount spent by the armed forces in their recruiting programs is unknown. The American Forces Radio and Television Service spent at least $229,000 in 1969 in the production of 1,000 radio and 300 television spot announcements. Commissioner Johnson dissenting, J.A. 29, citing information provided by the Office of the Controller, U. S. Department of Defense. Presumably these spots are all "recruiting" ads. The Navy alone receives from eight to ten million dollars ($8,000,000 to $10,000,000) in free time for military programming over the airwaves. Ibid, citing Hearings on Fiscal Year 1971 Department of Defense Budget, House Subcommittee on Defense Appropriations, 91st Cong., 2d Sess., Pt. II at 86 (March 3, 1970). It seems safe to assume that this figure grows by four or five times when all other services, e.g., Army, Marines, Air Force, National Guards, Coast Guard, etc., are included. This cost does not include the imputed value of the talent of contributors like Flip Wilson, Jonathan Winters, Jack Webb, etc. Other costs are also hidden. See J.A. 28, n.3.

3) The Potential Consequences for the Individual

In 1967, the F.C.C. relied primarily on the dangerousness of cigarette smoking to bring cigarette ads within the fairness doctrine. But as the dissenting Commissioner observed, it is anomalous to say that smoking is more dangerous than bearing arms.

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*/Source: Budget Branch, Selective Service System (November 4, 1970).

"...consider some simple statistics. In 1969, some 59,000 Americans (49,000 men and 10,000 women) died of lung cancer, and over 90% of these deaths are reputedly linked to cigarette smoking. Smoking and Lung Cancer, Public Health Service pamphlet (1970).

This means that of the 70,000 Americans who consume tobacco in one form or another, approximately 53,100 -- or one out of 1,300 -- died of lung cancer in 1969. (If one accepts the higher figure of 300,000 cigarette-related deaths per year, the ratio becomes one out of 233.) The enormity of this problem in part lead (sic) the FCC several years ago to apply the Fairness Doctrine to cigarette commercials. Cigarette Advertising, 9 F.C.C. 2d 921 (1967).

Yet what of the hazards of military service? During the same period in question, the United States had 3,127,000 servicemen in uniform around the world -- many of whom were thousands of miles from Vietnam. Of that total number, however, approximately 11,527 -- or one out of 275 -- lost their lives in Vietnam. Source: Office of Public Information, Southeast Asia Desk, U. S. Department of Defense (June 18, 1970).

Simply stated, it is at least as dangerous to enlist in the armed services as it is to use tobacco. This Commission has ruled that invitations to smoke cigarettes raise issues of sufficient controversy and public importance to invoke the Fairness Doctrine. Yet invitations to join the military do not. Why? Frankly, the majority's reasoning -- what there is of it -- escapes me." J.A. 26-27.

4) The Degree of Public Action

Since the first nationwide draft law was enacted in 1917, Congress has continually indicated substantial concern with providing those individuals with bona fide objection to regular military service with ways of avoiding the bearing of arms. Essentially, Congress has attempted to strike a balance between maintaining a military force and protecting individual freedoms. Draft Act of 1917, 40 Stat. 78 (1917); Selective Service Act of

1940, 54 Stat. 885, 50 U.S.C. App. §§301-318 (repealed); Selective Service Act of 1948, 62 Stat. 604 (1948); Universal Military Training and Service Act, 65 Stat. 77 (1965); Military Selective Service Act of 1967, 50 U.S.C. App. §451 et seq. Thus there is a clear national policy supporting the belief that alternatives to regular military service are desirable.

5) The Interest of the Audience

The statistics and laws recited above cannot reflect the extent to which the public has debated the desirability of regular military service. The debate has waged hot and heavy in ways that touch the lives of all Americans. Popular songs such as Buffy St. Marie's "The Universal Soldier", Winfield & Strong's "War", and Country Joe McDonald's "I Feel Like I'm Fixin' to Die Rag" bring the issue into the day to day life of every youth. Numerous movies of the last few years confront all Americans with the problems soldiers must face.*/ Legal journals have been filled with debates over the issue of the consequences for the individual of the legality of armed conflict.**/

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*/E.g., Greetings! (1968), The Anderson Platoon (1968), Oh! What a Lovely War (1969), Catch-22 (1970), Joe (1970) and Patton (1970). In neither this footnote nor any of the following four footnotes has petitioner attempted to even scratch the surface of the amount of materials actually bearing on these issues. An "e.g." cite was never more justified.

**/E.g., Falk, Vietnam War & Int'l Law, Vols. I & II (1969); Andonian, Law and Vietnam, 61 ABA J. 457 (1968); Deutsch, Legality of the War in Vietnam, 7 Washburn L. J., 153 (1968); Faulkner, War in Vietnam: is it Controversial?, 56 Geo.L.J. 1132 (1968); Ferencz, War Crimes Law and the Vietnam War, 17 Am. U.L.Rev. 403 (1968); Malawer, Vietnam War under the Constitution: Legal Issue Involved in the United States Military Involvement in Vietnam, 31 U.Pitt.L. Rev. 205 (1969); Velvel, War in Vietnam: Unconstitutional, Justi-

Other facets of literature have concerned themselves with the personal trauma of directly or indirectly participating in war. The moral dilemma of whether or not bearing arms is a desirable way to serve one's country is introduced to most persons as early as high school through such literature as Wilfred Owens' satirical poem, "Dulce et Decorum Est"***/ and John Dos Passos' novels.****/ The market has been flooded with books and magazine articles discussing the awesome moral, ethical and emotional conflicts military life presents to an individual.*****/

(continued)

**/ ciable, and Jurisdictionally Attackable, 16 Kan.L.Rev. 449 (1968); Note, Military Law Nuremberg Rule of Superior Orders - United States Court-Martial Tribunal Admits Evidence of United States War Crimes in Vietnam in Support of Superior Orders Defense, 9 Harv. Int'l L.J. 169 (1968); Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv.L.Rev. 1771 (1968); Note, President, the Congress, and the Power to Declare War, 16 Kan.L. Rev. 82 (1967). Cf. J.A. at 25-26.

***/Cromie, ed., Where Steel Winds Blow 98 (1968). Where Steel Winds Blow is a collection of "Poets on War." Other poetic works are, e.g., Agee, "We Soldiers of All Nations Who Lie Killed," The Collected Poems of James Agee 160 (1969); Bates, ed., Poems of War Resistance (1969); Lowenfels, ed., Where is Vietnam? (1967).

****/E.g., Dos Passos, Three Soldiers (1921). See also, e.g., Sassoon, Memoirs of an Infantry Officer (1930); Shaw, Arms and the Man (1898); Styron, The Long March (1952); Trumbo, Johnny Got His Gun (1939).

*****/E.g., American Friends Service Comm., The Draft? (1968); Finn, Protest: Pacifism and Politics (1968); Fulbright, The Pentagon Propaganda Machine (1970); Gardner, The Unlawful Concert (1970); Gaylin, War Resisters in Prison (1970); Knoll & McFadden, War Crimes and the American Conscience (1970); Rivkin, GI Rights and Military Justice (1968); Rose, Violence in America (1969); Sherrill, Military Justice Is to Justice as Military Music Is to Music (1970); Wells, The War Myth (1967); Brown, "For an All-Volunteer Military," War/Peace Report 9 (April 1969); Burrows, "Vietnam: A Degree of Disillusion," Life 66 (September 19, 1969); Congressional Conference on the Military Budget and National Priorities, "The Power of the Pentagon," The Progressive (June 1969); Glass, "Defense Report/Draftees

To say the issue is not controversial is to ignore much of the visual and audio information encountered daily by most Americans. And few of these works have concerned themselves with whether one is an enlistee or a draftee. The issue is the desirability of regular military service.

II. The Commission's Deference to the Licensee's Exercise of Discretion With Respect to Complying with the Fairness Doctrine Violates the Communications Act of 1934 and the Fifth and First Amendments to the Constitution

There are three key elements in a determination whether the fairness doctrine has been violated. First it must be determined what issue was discussed. The second determination, as noted in Section I(C), supra, triggers the operation of the fairness doctrine -- it must be determined whether the topic of

*****/ (continued)

Shoulder Burden of Fighting and Dying in Vietnam," National Journal 1747 (August 15, 1970); Halberstam, "Questions Which Tear Us Apart," Harper's Magazine 70 (February 1970); Hatfield, "A Volunteer Army Is the Answer," New York Times Magazine 34 (March 30, 1969); Herr, "Khesanh," Esquire 118 (September 1969); Just, "Soldiers: Part I," The Atlantic 59 (October 1970); Just, "Soldiers: Part II," The Atlantic 59 (November 1970); Kemp, "The Military-Civilian Complex," The Harvard Bulletin 18 (May 25, 1970); Lake, "Now That He's Home Again," McCalls 44 (January 1969); Lee, "The Negro and the Draft," Current History 28 (July 1968); Lindeman, "The Rise and Fall of Mike Sharp," Parade 4 (May 17, 1970); Lifton, "Scars of Vietnam," Commonweal 554 (February 20, 1970); Merrick, "Massacre Trial: A Shift in the War?" U.S. News and World Report 23 (December 15, 1969); Oi, "Can We Afford the Draft?" Current History 34 (July 1968); Opton and Sanford, "Toward a Critical Social Science," Trans-Action 4 (March 1970); Poppy, "The Draft: Hazardous to Your Health?" Look 32 (August 12, 1969); Ripon Society Position Paper, "The Draft's Agony of Conscience" (October 1968); Sheerin, "Psychological Causes and Effects of Atrocities," Catholic World 2 (April 1970); Sherrill, "Justice Military Style," Playboy 120 (February, 1970); Tax, "Society, the Individual and National Service, Current History 78 (August 1968).

the broadcast matter is a controversial issue of public importance. The third determination is whether once the fairness doctrine has been triggered, the licensee has presented a balanced point of view with respect to the issue involved. It is established Commission practice to defer to the judgment of the licensee on all three issues. E.g., Complaint of Norman Zafman F.C.C. Mimeo #57246 (November 6, 1970); Applicability of the Fairness Doctrine to Controversial Issues of Public Importance 29 Fed. Reg. 10415, 10416, 10419, (1964) (hereafter Fairness Primer).

A. The Commission's Deference to the Judgment of the Licensee is Inconsistent with the Public Interest Standard

American broadcast law is founded on the principle that an informed public opinion will serve the interests of democracy. The F.C.C. is authorized to issue and revew broadcast licenses so long as it is convinced that the "public interest, convenience and necessity" is being served. Communications Act of 1934, Section 307(a),(d), 47 U.S.C. §307(a),(d). From the beginning the Commission has emphasized the responsibility of broadcasters to present issues fully and fairly. Great Lakes Broadcasting Company No. 4900, F.R.C., Third Annual Report, p. 32, 33 (Nov. 15, 1929);*/ Robert Scott, 11 F.C.C. 372 (1946); United Broadcasting Co., 10 F.C.C. 515, 517-18 (1945)**/ The Editorializing Report, supra,

*/"Public interest requires ample play for the free and fair competition of the opposing views [on] addresses by political candidates [and] to all discussions of issues of importance to the public. Great Lakes Broadcasting Co. at 33.

**/Even Mayflower Broadcasting Corporation, 8 F.C.C. 333 (1941), which prohibited editorializing by broadcast licensee (and which was subsequently overruled by the Editorializing Report) rested on the necessity of assuring balanced presentation and robust debate on important issues.

> "the public interest can never be served by a dedication of any broadcast facility to the support of ...[a licensee's] partisan ends.

made it perfectly clear that democracy requires informed public opinion and that "licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of a controversial issue over their facilities..." 13 F.C.C. at 1251. In presenting all sides of controversial issues, however, the licensee must engage in the tripartite exercise of discretion discussed above.

The Commission must therefore set forth guidelines to, on the one hand, aid a licensee in determining what constitutes a reasonable judgment with respect to whether a controversial issue of public importance has been raised and, if so, what issue. Discretion cannot be delegated without reasonable guidelines. Cf. Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Whitehill v. Elkins, 389 U.S. 54 (1967); NAACP v. Button, 371 U.S. 415 (1962); Kingsley Int'l Pictures v. Regents, 360 U.S. 694 (1959); Burstyn v. Wilson, 343 U.S. 495 (1952); American Communications Ass'n v. Dowds, 339 U.S. 382 (1952). On the other hand, the guidelines are necessary to aid the Commission in its own determination as to whether a licensee's judgment was discretionary.

1) "What" Issue was Presented?

In the instant case, the Commission and the licensees had available ready guidelines for evaluating the licensee's

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(continued)**/

Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented." 8 F.C.C. at 340 (emphasis added)

judgment as to the issue presented by the recruitment advertisements. Under Banzhaf, supra, the test is the net impression which the ad is likely to have on a casual observer in the group to which the ad is directed. See pp. 13-14, supra. But both the Commission and the licensee eschewed these tests in favor of unarticulated, discretionary standards impossible of ascertainment. Indeed as is made clear by the opposite results in Alan F. Neckritz and the instant proceeding with respect to the issue presented by the ads, there were no guidelines.

The lack of guidelines to judge the issue presented by particular broadcast matter led both the Commission, see Section I (B), supra, and the licensee to misjudge the issue here involved. One licensee responded to Professor Green's complaint by asserting that it had presented a balanced point of view with respect to the pros and cons of the draft. J.A. 12. The other said the issue is the desirability of maintaining armed forces. J.A. 14. The Commission woodenly adopted both characterizations arrived at by the licensees in their (the licensees') discretion. J.A. 34,35. Neither stated the criteria applied to the determination that the draft was the issue. For they could not. Under any reasonable interpretation of these ads, it is plain that they do not deal with the draft. See pp. 11-13, supra.

2) Is the Issue a Controversial Issue of Public Importance?

The extent to which the Commission has addressed itself to the guidelines to be followed in determining what issue is raised by broadcast matter and whether particular material relates to a controversial issue of public importance is set forth in the Fairness Primer, a compendium of cases and interpretations. But the Commission's entire discussion of the topic is circuitous. The Primer essentially establishes that public issues of interest are those "actively controverted by the public" and "of public importance". 29 Fed. Reg. at 10416-10418. The Commission's Editorializing Report is of no more help. There the Commission notes that the fairness doctrine applies:

> "...to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community..." 13 F.C.C. at 1249.

In the Editorializing Report, the Commission stated that "...licensees [must devote] a reasonable percentage of their broadcast time to the presentation and discussion of public issues of interest in the community by the particular station." Ibid. Since that time the Commission has reiterated this rule on a number of occasions, most recently under the compulsion of the Supreme Court's decision in Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367 (1969). See infra, Section III.

In Friends of the Earth, 24 F.C.C. 2d 743, 750-51, app'l pending, No. 24,456 (D.C. Cir.), (1970), the Commission, while declining to extend its ruling requiring cigarette advertise-

ments to be balanced by opposing points of view, nonetheless noted that:

> "On the other hand, the broadcaster does have an obligation to inform the public to a substantial extent on these important issues, including prime time periods. While we have stressed that the broadcaster has large discretion in choosing and covering controversial issues of public importance, it would be no more reasonable for broadcasting to ignore these burning issues of the seventies -- which may determine the quality of life for decades to come -- than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem."9/
>
> "9/Of course the broadcast licensee retains discretion as to issues, format, appropriate spokesmen, etc. Thus, a broadcaster located in an area with no air pollution issue but a severe water pollution one would clearly focus on the latter. Another, such as in New York City, would be confronted with public issues in both respects. In short, there remain wide areas for judgment by the licensee, based upon the facts of his particular area."

Outside of this one footnote, providing that a licensee's exercise of his discretion in deciding whether a controversial issue of public importance has been presented should reflect the needs of the particular area which it serves, a licensee is without guidelines as to the factors to be considered in exercising its judgment with respect to what is a controversial issue, even though he remains under an affirmative duty to present a balanced presentation with respect to these issues.

The deference to a virtually unfettered descretion in the licensee to bar presentation with respect to any issue is inconsistent with the notion that the broadcast media must be used in the public interest to promote an informed public. The affirmative obligation to promote vigorous debate and inform the

public as to those issues touching their lives, cf. Banzhaf, supra 405 F.2d at 1102 requires that the licensee come forward with a rationale in support of its determination that particular broadcast matter is not related to presentation of a point of view on a controversial issue of public importance. Given the presumption in favor of using the media as a means of presenting ideas and information, a licensee must not be allowed to silence speech unless he makes an affirmative showing that the speech is not related to a matter of public importance with respect to which he has already presented a point of view.

The instant proceeding is illustrative of the danger inherent in the Commission's present procedure. Assuming arguendo that the issue involved here is whether one should enlist in the armed forces, the licensee has made no showing that this is not a controversial issue of public importance. Cf. pp. 11 - 23 , supra. Nor has the Commission presented any facts to justify this determination. Indeed all facts of which the Commission had notice and on which it relied indicate that the Commission and the licensee both regard the ads in question, as relating to matters of concern to the community. For example, both regard the ads as "public service announcements," J.A. 35. But how can they be public service announcements without relating to matters of public concern? Still Professor Green was not allowed to present an opposing point of view.

* * *

The compounding effect of this dual delegation of discretion, i.e., whether and what controversial issue has been presented, without any guidelines, is to create a presumption against

speech inconsistent with the public interest standard's requirement that there be an affirmative effort to foster the vigorous debate that is the bedrock of our democracy. In the instant proceeding, Petitioner Green was denied the right to present opposing points of view on an issue because neither the licensee nor the Commission defined the issue properly under Banzhaf. The issue is, under any criteria, of controversial public importance. The Commission not only failed to judge in an ascertainable manner the accuracy of the licensees' determination that no controversial issue of public importance had been presented, but similarly for a lack of guidelines failed to determine adequately precisely what issue is involved.

3) Has the Licensee Presented a Balanced Presentation?

The Commission has stated, with the approval of this Court, that a licensee "must provide a significant amount of time" (emphasis added) to the presentation of an opposing point of view once one side of a controversial issue has been presented. WCBS-TV, supra. 9 F.C.C. 2d at 949 aff'd sub nom. Banzhaf, supra. But nowhere has the Commission been more docile in deferring to licensee judgment than in the determination of how the licensee is to comply with the fairness doctrine. The licensee's discretion in this area is a concept of highest sanctity, etched over the years upon the Commission's portals and stated with frequency and pride. In the absence of an abuse of discretion, the licensee's judgment will not be disturbed, and the Commission will not substitute its judgment for that of the licensee. Madlyn Murray, 40 F.C.C. 647 (1965); California Democratic State Central Committee,

40 F.C.C. 501, 503 (1960). See J.A. 23 for a discussion of this proposition.

So long as the licensee makes a good faith effort to present balanced coverage, on an issue, Alan F. Neckritz, J.A. 38, no matter what the time, format, or frequency of its presentation with respect to one side of the issue, it may choose its own time, format, and frequency for the opposing point of view. Paul E. Fitzpatrick, 40 F.C.C. 443 (1950); Editorializing Report, 13 F.C.C. at 1251.

In fact this deference contravenes this Court's mandate in Banzhaf and vests the licensee with a virtually unfettered discretion. Thus the Commission has held that a ration of eight advertisements in favor of smoking to one anti-smoking spot is sufficient. National Broadcasting Company (WNBC), 16 F.C.C. 2d 947 (1969). Five Presidential addresses advocating the Administration's Indochina war policies in prime time at a time of the President's choosing, with the President choosing his own format, using his own visual aids, speaking uninterrupted, and without opportunity for questioning, and pre-empting all three major networks so as to have virtually a captive audience gave rise to an opportunity for one prime time rebuttal by a spokesman of the licensee's choice at a time (during prime time) of the licensee's choosing in an uninterrupted format of the licensee's choice in competition with the regular television fare of the other two networks. Committee for Fair Broadcasting, et al., 25 F.C.C. 2d 283 (1970). And as this brief is being typed, the Commission has ruled that a newcaster's editorials regularly delivered in a par-

ticular time slot during the evening news can be balanced by opposing presentations which may or may not be seen by a comparable or the same audience. Norman Zafman, Mimeo #57246 (November 6, 1970).

The effect of the Commission's practice is to silence speech in the face of an express Congressional intent, an intent which the Commission has itself often expressed, to foster debate. Despite the revulsion of prior restraints on speech which has characterized our entire history, see generally Near v. Minnesota, 283 U.S. 697 (1931), the Commission again concedes the benefit of the doubt to the licensee who would bar speech rather than the person seeking access to the airwaves. Not only must the speaker come forward with specific allegations, Fairness Primer, 29 Fed. Reg. at 10416, but it is freedom of speech that bears the burden of persuasion. This practice is inimical to a public interest standard that seeks to promote robust, wide open debate.

In the case at bar, the Commission deferred to the licensees' judgment that they had been fair with respect to the matter at issue because "they have offered an opportunity for the presentation of [opposing] views in the context of substantive programming", J.A. 35. In the case of one licensee, WRC, the information was inaccurate. See footnote on pp.6-7, supra. But in any event, the discussion program format on an early Sunday morning religious program is not sufficient to balance a barrage of ads interspersed throughout the broadcast day, including prime time. WMAL conceded that the forum it offered attracted small audiences, J.A. 4, n. 4, J.A. 13. The licensees offered no

specific evidence of compliance with the fairness doctrine, even assuming the draft was the relevant issue, other than these token gestures. For the reasons set forth in Commissioner Johnson's dissent, this is not adequate. J.A. 29. This Court has recently had occasion to note that it may be necessary to treat advertisements differently from other means of presenting an issue, and that a series of short announcements may require similar treatment for the opposing point of view.*/ Retail Store Employees Union, Local 880, supra, slip op. at 18.

The announcements in question, moreover, are public service announcements, run free by the stations. Not only does the licensee compromise the editorial neutrality he retains when he runs an ad for pay as part of his commercial activity; he also could cure the imbalance created at no cost to himself by replacing half the recruitment ads with anti-recruiting ads. See J.A. 29-30.

* * *

It may be necessary to reside some discretion in a licensee. The Commission cannot be responsible for the everyday decision making of a station. But whatever the necessity of discretion at some levels of administration of the fairness doctrine, the compounding effects of almost limitless discretion in the licensee at each step of the resolution of matters bearing so intimately on the level of public debate on the vital issues of the day contravenes the public interest.

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*/"[I]n the developed areas of the world school no longer is the access to a new world of experience...the educator. It is rather...[an] anemic substitute. The preschool child...is... introduced to the world through radio and television in a much more direct, more effective, more gripping manner than the most gifted schoolmaster could emulate. Whatever the contents of the electronic message, in form and style they are expert, masterly, teaching, communicating.

Few messages are as carefully designed and as clearly communicated as the thirty-second television commercial. Every

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B. The Commission's Deference to the Judgment of the Licensee Violates the Due Process Clause of the Fifth Amendment

Congress has delegated responsibility for the administration of the Communications Act of 1934 to the Commission. The nature of the Commission's redelegation to the licensee in the fairness area has been described above. This redelegation is subject to the same standards as the original Congressional delegation to the Commission, see Evans v. Newton 382 U.S. 296, (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Smith v. Allwright, 321 U.S. 649 (1944), and the action of the licensee is subject to state action standards. See Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).*/

The Commission's delegation of overly broad discretion at every level of administration of the fairness doctrine is necessarily violative of due process. Definitive standards setting forth guidelines to be followed, must be provided. Interstate Circuit v. City of Dallas, supra; Whitehill v. Elkins, supra; N.A.A.C.P. v. Button, supra; Burstyn v. Wilson, supra; American Communications Ass'n. v. Dowds, supra; and where the

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split second counts; every motion is in balance and rhythm; every work is a spell. Few teachers spend in their entire teaching careers as much time or thought on preparing their classes as is invested in the many months of writing, drawing, acting, filming, and editing one thirty-second commercial. . . . it conveys accessible information, clear image, and perfect comprehension. . . .its methodology, is indeed the prototype of the ideal "program" with its three key elements: effective sequence of the material, validation through repetition, and self-motivation of the learner through pleasure." Pp. 336-337. Drucker, The Age of Discontinuity.

*/ A thorough discussion of why the licensee's conduct is subject to the same standards as the conduct of a state agency appears in Business Executives Move For a Vietnam Peace, 25 F.C.C. 2d 242, 253-59 (1970) (Commissioner Johnson, dissenting).

exercise of the discretion threatens precious First Amendment guarantees, the courts have been particularly careful to scrutinize the scheme for constitutional infirmities. Shuttlesworth v. City of Birmingham, 394 U.S. 149 (1969); Interstate Circuit v. City of Dallas, supra; Cox v.Louisana, 379 U.S. 536 (1965); N.A.A.C.P. v. Button, supra; Burstyn v. Wilson, supra; N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-61 (1958). In the absence of a showing of a compelling interest, the delegated discretion must be no more than the minimum necessary for achieving the legislative or administrative goals. It is not sufficient that the discretion has a rational basis. There must be available no means "less drastic" in their consequences for individual liberties. E.g., United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). See generally, Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969): Wormuth & Merkin, The Doctrine of the Reasonable Alternative, 9 Utah L.Rev. 254, 267-93 (1964).

Under the fairness doctrine as currently administered and applied, the F.C.C. has delegated all responsibility to the licensee. The licensee, in turn, is operating with no standards. He exercises his "good faith" discretion virtually without accountability, even though he may have one eye on the cash register and the other on the political climate while he does so, seeing a picture hardly likely to predispose him in favor of speech. Yet broadcast licensees make their discretionary choices with sweeping, and generally unassailable, immunity because of the compounding effects of wide discretion at each level of determination. Such

delegations of virtually absolute discretion not only threaten First Amendment rights; they encourage erratic administration and substitute the licensee's judgment for the legislative mandate. Cf. Interstate Circuit v. City of Dallas, supra at 685; Marcus v. Search Warrants, 367 U.S. 717 (1961).

The opposite results in Alan F. Neckritz and the case at bar are illustrative. Petitioner's complaint has been resolved in a manner that not only leaves the legislative mandate vague; it is left contradictory. The public, therefore, drifts in an aimless sea unable to speak in the first place, and precluded from effectively challenging later. Such a scheme is clearly violative of due process.

C. The Commission's Deference to the Discretion of the Licensee Violates the First Amendment of the Constitution by Creating a Prior Restraint on Speech

The First Amendment creates a presumption against conduct which imposes or tends to impose prior restraint on the free exercise of speech. Mills v. Alabama, 384 U.S. 214 (1966); Near v. Minnesota, 283 U.S. 697 (1931). The presumption has added strength in areas dealing with political viewpoints or controversies. Shuttlesworth v. City of Birmingham, 394 U.S. 149 (1969). In the absence of speedy procedures for resolving attempted prior restraints on speech, in which the restraining party bears the burden of proof and must initiate the proceedings, regulatory schemes that impose prior restraints on speech are obnoxious to the Constitution. Shuttlesworth, supra; Teitel Film Corporation v. Cusack, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

In the fairness area, the licensee cannot of course initiate the complaint. It is plain that the burden of doing so falls upon the person seeking to exercise First Amendment rights. He must notify the station of his objection. But the burden does not stop there. Only after he has initiated the complaint with the station and exhausted his remedies with the station may a citizen seek redress from the Commission. Fairness Primer 29 Fed. Reg. at 10416, n.5. The licensee responds to the complaint addressed to him and waits for the complainant to initiate proceedings by a separate letter of complaint to the Commission.*/ It is the complainant, the person seeking to speak, not the licensee, the restrainer, who must bear the burden of complaining to the Commission. The licensee is not required to report to the Commission immediately, upon receipt of a fairness complaint and rejection thereof, that he has declined to permit speech and provide a rationale for so doing. Once the complaint letter is received by the Commission, the licensee is generally afforded an opportunity to respond at the Commission level. The complainant may then submit a reply.

Once the complaint has reached the Commission level, it is the licensee who is seeking to bar speech, not the complainant who is seeking to exercise First Amendment rights, that is indulged every presumption. See pp. 23-33, supra. And even so the chances for a speedy resolution are infinitesimal. The more

*/This procedure is generally followed even where the complainant simultaneously sends a copy of his letter to the station and to the Commission. The Commission generally awaits a separate letter of complaint addressed to it.

likely result is extended delay;*/ all the while, irretrievable First Amendment rights are dissapating. Indeed by the time the Commission has resolved the issue, it may no longer be timely.

The entire procedure governing the handling of fairness complaints controvenes the standards required by the First Amendment. Shuttlesworth, supra; Teitel, supra; Freedman, supra. Every step of the proceeding favors prior restraint: the licensee has discretion to determine what the issue is, whether it is controversial, and whether its presentation has been balanced; the speaker must initiate the proceeding with the station; the speaker must await response from the station; the speaker must initiate the complaint with the Commission even though it is the licensee who is censoring speech; the speaker bears the burden of proof since every presumption is in favor of the licensee; the speaker is silenced while the Commission's cumbersome procedures plod along. A greater prior restraint can hardly be imagined. Indeed, the chilling effect of such a scheme on the exercise of First Amendment rights is alone sufficient to render it a nullity. Cf. Baggit v. Bullet, 377 U.S. 360, 371-74 (1964). N.A.A.C.P. v. Alabama, supra, 357 U.S. at 460-63; American Communications Ass'n v. Dowds, supra, 339 U.S. at 393 (1952).

In petitioner's case, the original letter was sent to the stations in December, 1969. The Commission received petitioner's complaint on March 20, 1970. Even though the Commission did not solicit responsive pleadings from the stations, it nonetheless took

*/For example, in Business Executives Move, supra, the letter of complaint was filed with the Commission on January 22, 1970. The responsive pleadings were dragged out to April 7, 1970. The Commission did not render its decision until August 6, 1970, four months after the last pleading was filed, nearly seven months after the letter of complaint.

almost three months to resolve this complaint. It is well to keep in mind Justice Harlan's admonition in Shuttlesworth:

> "...timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." 394 U.S. at 163 (concurring opinion, adopted by majority).

III. The Licensee's Refusal to Allow Petitioners to Present Information About Lawful Alternatives to Bearing Arms Is Contrary to the Public Interest Standard and the First Amendment

While the requirement of presenting alternative points of view does not arise until one point of view has been presented, the fairness doctrine also requires that a licensee initiate the presentation of information with respect to controversial issues of public importance. Red Lion Broadcasting Company, Inc. v. F.C.C., 395 U.S. 367 (1969); Retail Store Employees Union, Local 880; supra, slip op. at 17. This obligation has been explicitly recognized by the Commission, Friends of the Earth, supra, 24 F.C.C. 2d at 750-51. Indeed the Commission's former General Counsel has stated that the obligation

> "applies not just to typical 'controversial issues of public importance.' As 'proxies' or 'fiduciaries' for the entire community [citation omitted], broadcasters would appear subject to a wide range of program responsibilities." Staff Memorandum: Red Lion Broadcasting Company, Inc. v. F.C.C., released in Reuben B. Robertson, F.C.C. 70-1063 (released October 9, 1970).

This duty to initiate discussion of issues of importance to the community derives from two sources: the public interest standard and the Constitution.

A. The Constitution

The underlying constitutional compulsion of the fairness doctrine emerged clearly in Red Lion, supra. There the Supreme Court rejected, as had this Court in Banzhaf, supra, 405 F.2d 1082, the position that the fairness doctrine would have a chilling effect on speech by dissuading licensees from presenting any point of view on controversial issue. The Court stated that a licensee has the duty to dedicate its facilities to issues of concern to the community.

> "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." 395 U.S. at 390.

And therefore

> "...the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies." Id. at 391.

The information which Professor Green sought to present has not heretofore been heard by the public on WMAL or WRC. Neither proferred any evidence of having presented these views. But the public has a "paramount" right, Id. at 390, to hear this information, "to receive suitable access" to the ideas espoused by petitioner.

Indeed in view of the potential consequences for an individual who fails to have this information, a right far more precious that First Amendment rights may be at stake -- the right to live. Having heard only the ads exhorting enlistment and the desirability of bearing arms, he may have concluded that he had no choice but to bear arms, despite its potentially demeaning and fatal effects.

For the public to hear these views, an adequate forum is required. Speech means effective speech. Edwards v. South Carolina, 372 U.S. 229 (1963); Saia v. New York, 334 U.S. 558 (1958), and the right to an audience. Ibid. The adequacy of WMAL's offer and WRC's purported offer is not an effective platform. As this court noted in Banzhaf, supra, 405 F.2d 1099.

> "The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred 'yeses' for each 'no,' when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed."

More recently, this Court has explicitly noted that "time, rather than information, is of the essence", Retail Store Employees Union, Local 880, supra, slip op. at 18, in conveying a message. While both Banzhaf and Retail Store Employees Union, Local 880, were fairness cases, the same considerations of what is necessary to convey a message are applicable. When it is considered that recruitment ads are interspersed throughout the broadcast day and have been for years, the inadequacy of the stations' offers to present information is clearly inadequate. See pp. 29-32, supra.

The notion that adequate access must be granted to petitioners point of view in order to vindicate his right to speak and the publics right to hear is not unique. In Marsh v. Alabama, 326 U.S. 501 (1946), for example, the Supreme Court recognized that the First Amendment required public access to privately owned sidewalks. In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) it was held that the First Amendment requires picketers to be granted access to the privately owned shopping center which was the object of their protest. Red Lion specifically related access considerations to the electronic media. 395 U.S. at 396. Although it was not directly faced with the issue of denial of access in Red Lion, the Court nonetheless felt it necessary to warn that a factual situation where "a discriminatory refusal to require the

licensee to broadcast certain views which have been denied access to the airwaves...would raise more serious First Amendment issues" than the case before it. Ibid.

A situation strikingly similar to the one the Court spoke of is manifest in the case at bar. WRC and WMAL have denied reasonable access to petitioner to present his views. The side of the issue to which petitioner sought to address himself has not been presented by either licensee. The petitioner has been deprived of the right to a forum explicitly contemplated in Red Lion. See generally, Barron, An Emerging First Amendment Right of Access to the Media?, 37 Geo.Wash.L.Rev. 487 (1969); Barron, Access to the Press - A New First Amendment Right, 80 Harv.L.Rev. 1941 (1967); Horning, The First Amendment Right to a Public Forum, 1969 Duke L.Rev. 931; Gorlick, Right to a Forum, 71 Dick.L.Rev. 273 (1967); Note, The Listener's Right to Hear in Broadcasting, 22 Stan.L.Rev. 863 (1970).

B. The Public Interest Requires That These Views be Presented

The constitutional commitments expressed in the First Amendment cannot be ignored in defining the public interest. The Commission has, as noted above, pp. 24-25 , often recognized the vital function to be played by the broadcast media in lubricating the wheels of our democracy. It has expressed its devotion to assuring wide open, robust debate.

Adequate public debate must require the opportunity to gain access to the media. This assures the presentation of diverse and antagonistic points of view to foster a climate conducive to resolution of important matters of public concern.

This Court has recognized the importance to the public interest of this debate where matters of national policy are at stake. In Banzhaf, this Court noted the relation of a national policy of public health to the presentation of anti-smoking spots. In Retail Store Employees Union, Local 880, supra, this Court observed the relation of congressional concern with equalizing bargaining power between union and employer as an important factor in its determination that a station was controverting the public interest by declining to carry ads about a boycott of a store whose advertisements the station carried. Slip op. at 22-23. So too in this case, Congress has evidenced a concern with insuring that those opposed to bearing arms are able to seek equally honorable alternatives. The Commission is obligated to respond to that congressional expression by facilitating the expression of opposing views.

IV. The Commission's Order Should be Reversed

A. "The Administrative Conduct Reflected in This Record is Beyond Repair"

Petitioner believes that the record in this case reflects that same "curious neutrality" in favor of the licensees that led this Court to conclude that the Commission was not capable of impartially judging whether the license of station WLBT-TV, Jackson, Mississippi, should be renewed. Office of Communications of United Church of Christ v. F.C.C., ___ App. D.C.____ , _____ F.2d ___ , No. 19,409, slip op. at 6 (D.C. Cir. June 20, 1969).

The Commission's "curious neutrality" is illustrated by the eagerness with which it accepted the respective licensees' characterizations of the issue, even though these characterizations are inconsistent.*/ J.A. 12, 14, 34, 35; text supra, pp. 7, 8, 26. On the other hand, the Commission declined to deal with petitioner's claim that WMAL's policy was inconsistent with respect to carrying spot announcements dealing with controversial issues of public importance. J. A. 7. But the Commission has been willing to sanction a licensee for failing to follow its (the licensee's) own policies where the Commission was displeased by the content of the program broadcast in contravention of the policy. Jack Straw Memorial Foundation, (KRAB-FM), 21 F.C.C. 2d 833 (1970).

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*/Petitioner assumes that the Commission's reference to the lack of any indication that any announcement presenting one side of a controversial issue "was broadcast by any station in the San Francisco area", J.A. 35 (emphasis added), was an inadvertent error (since petitioner was complaining about Washington, D.C., stations) and does not reflect the overall consideration his claim was given by the Commission.

After uncritically accepting the licensee's mischaracterization of the issue, the Commission readily accepted the licensees' assertions that they had been fair with respect to the issue involved, as characterized by the licensees, even though the licensees proffered no evidence, other than the inadequate offers referred to in the text, in support of these assertions. By contrast, petitioner was asked to provide "specific evidence" that military recruitment ads portray service in the military as the only honorable way of serving one's country. J.A. 34, n.1.

The Commission also departed from its normal procedure of soliciting responses from the licensees against which complaints are filed and then offering the complainant an opportunity to reply -- at least the Commission departed from the latter part of the procedure. With respect to the former, it did extend to WRC-TV the hospitality of "informally" accepting WRC's evidence, J.A. 34, and relying on it as determinative, J.A. 35, without informing, or requiring WRC-TV to inform, Professor Green and without affording him an opportunity to reply to the inaccurate evidence. See note on pp. 6-7, supra.

In short, the Commission again demonstrated its willingness, perhaps more accurately its zeal, to afford the licensee every opportunity to vindicate his position while attempting, as this Court has so often observed in the past, to view citizens as interlopers. Office of Communication of United Church of Christ v. F.C.C., supra. Cf. Citizens Committee to Preserve the Present Programming of the "Voice of the Arts in Atlanta" on WGKA-AM and

FM v. F.C.C., No. 23,515 (D.C. Cir. October 30, 1970); Joseph v. F.C.C., 131 App. D.C. 207, 404 F.2d 207 (1968). The Commission's insensitivity to the need for fair treatment where valuable First Amendment rights hang in the balance has prejudiced its ability to resolve this proceeding impartially.

B. This Court Should Reverse the Commission's Order

Petitioner first filed his letter of complaint with the stations almost eleven months before this brief was written. At least another three or four months will elapse before this Court decides this case. While we deliberate, young men who do not desire to bear arms and who have legal conscientious alternatives to bearing arms may be dying or being maimed of body and mind for lack of information and for lack of hearing an opposing view to the one presented by these stations. The public's First Amendment right to hear this information must not be denied any longer. Petitioner's right to speak must be vindicated now.

This Court is particularly facil in resolving the issues raised by petitioner. The resolution of petitioner's constitutional claims is a province of the particular expertise of federal courts. This Court, by virtue of its seat at the site of the federal administrative apparatus, has a unique expertise in resolving the conflicting interests of administrative processes and constitutional rights. The Commission has not demonstrated a competence or willingness to discern the issues raised by petitioner. Meanwhile men die.

CONCLUSION

For all the foregoing reasons, petitioners

a) Reverse the Commission's Order of June 4, 1970, finding that stations WMAL-TV and WRC-TV had fulfilled their obligations under the fairness doctrine, the public interest standard, and the First and Fifth Amendments to the Constitution; and

b) Order the Commission to order WMAL-TV and WRC-TV to carry announcements opposing the desirability of regular military service.

Respectfully submitted,

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Robert J. Stein
1816 Jefferson Place, N. W.
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November 9, 1970

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,470

DAVID GREEN, INDIVIDUALLY AND AS
CHAIRMAN OF THE PEACE COMMITTEE
OF THE BALTIMORE MEETINGS OF THE
RELIGIOUS SOCIETY OF FRIENDS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

NATIONAL BROADCASTING COMPANY,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF AUTHORITIES

* Cases and other authorities principally relied upon are marked with an asterisk.

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED *

After broadcasting spot announcements soliciting voluntary recruitment in the armed forces, Stations WMAL-TV and WRC-TV rejected petitioner's request for free time to present spot announcements opposing military service. They did, however, offer time in the context of religious and discussion programs for petitioner to express his views. These offers were rejected.

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*/ This case has not previously been before this Court.

The issue in the case is whether the Commission could reasonably find that the stations' refusals to carry petitioner's promotional spot announcements did not violate the fairness doctrine, which in essence provides that licensees must afford reasonable opportunity for the discussion of controversial issues of public importance.

COUNTERSTATEMENT OF THE CASE

Petitioner, David Green, Individually and as Chairman of the Peace Committee of the Baltimore Meetings of the Religious Society of Friends, seeks review and reversal[1/] of an adverse ruling (J.A. 32-35)[2/] of the Federal Communications Commission. The Commission ruled that no violation of the agency's fairness doctrine occurred where Stations WMAL-TV and WRC-TV, Washington, D.C. declined to donate time to petitioner for the purpose of broadcast messages opposing military service after having aired recruiting announcements in behalf of the armed services. In reaching this judgment the Commission concluded that petitioner had not shown to be unreasonable WRC-TV's judgment that the broadcast of military recruitment advertisements did not present one side of a controversial issue of public importance. It also relied on

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1/ Petitioner's appeal reached this Court in the form of a "Petition for Review" filed pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2344.

2/ The Commission's ruling is contained in the Joint Appendix (J.A. 32-35) and is officially reported in 24 F.C.C. 2d 171 (1970).

the fact that no showing was made that the station had failed in their overall programming to present all significant contrasting views on the issue of the draft, including the views of petitioner.

A. The Fairness Doctrine.

Petitioner's complaint to Stations WMAL-TV and WRC-TV was based on the "fairness doctrine" which inheres in the "public interest" standard[3/] of the Communications Act. Under that doctrine, broadcast licensees are required (1) to devote a reasonable amount of time to the discussion of controversial issues of public importance, either nationally, statewide, or in the station's local service area, and (2) to do so in a fair manner so as to inform the public of all significant views on such issues. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); Public Notice of July 6, 1964, entitled Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 2d 598 (1964) (hereinafter called Fairness Primer)[4/]; 47 U.S.C. 315(a).[5/] The fairness doctrine

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3/ Broadcast licenses are granted, renewed, and transferred only "if the public interest, convenience, or necessity will be served." 47 U.S.C. 307, 308 and 309.

4/ The Fairness Primer contains past interpretative rulings applying the fairness doctrine to specific fact situations.

5/ 47 U.S.C. 315(a) provides in pertinent part that it is an obligation of broadcast licensees "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

was held by the Supreme Court in Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969) to be consistent with the Communications Act of 1934 [6/] and the First Amendment and its terms are familiar to this Court. See Red Lion Broadcasting Co. v. F.C.C., 127 U.S. App. D.C. 129, 381 F.2d 908 (1967); John F. Banzhaf, III v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969); Retail Store Employees Union, Local 880, Retail Clerks International Association, AFL-CIO v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, Case No. 22,605 decided October 27, 1970.

In applying the fairness doctrine to their day-to-day programming selections, broadcast licensees are "called upon to make reasonable judgments in good faith on the facts of each situation--as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesman to present the viewpoints, and all other facets of such programming." (Emphasis supplied), Fairness Primer, supra, 40 F.C.C. 2d at 599. As the Commission recognized when the doctrine was adopted:

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. Report on Editorializing, supra, 13 F.C.C. at 1251-1252.

6/ 47 U.S.C. 151 through 609.

For this reason, wide discretion is given a licensee in the making of program judgments. "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above [noted] programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." FAIRNESS PRIMER, SOPRA, 40 FCC @599 ~~Id. at 1247-1248~~.

With respect to complaints made to the Commission, it is expected that:

> A complainant [will] submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints. */ (Lar Daly, [40 F.C.C. 496] 1960; Cf. Cullman Broadcasting Co., [40 F.C.C. 576] 1963.)

*/ The complainant can usually obtain this 7/ information by communicating with the station.

7/ Fairness Primer, supra, 40 F.C.C. 600. See Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 127 U.S. App. D.C. at 150, 381 F.2d at 929 (1967), affirmed Red Lion Broadcasting Co., Inc. v. F.C.C., supra. This past fiscal year, the Commission, in the person of the Complaints and Compliance Division of the Broadcast Bureau, received, processed and ruled on more than 1700 "fairness doctrine" complaints received from persons throughout the country. During the months of March through June 1970, the period of time when the Commission's staff was evaluating and ruling on petitioner's complaint, the staff was also handling more than 600 other fairness doctrine complaints. Of approximately 58,000 complaints, comments and inquiries on broadcast matters received during the fiscal year of 1969, 2,000 of these complaints alleged violation of Section 315 of the Communications Act or failure to comply with the fairness doctrine. 35th Annual Report, p. 53.

> If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action. (Honorable Oren Harris, [40 F.C.C. 582 (1963)].)

B. Petitioner's Complaint.

On March 20, 1970, petitioner filed a complaint with the Commission alleging that Stations WMAL-TV and WRC-TV had violated the fairness doctrine by broadcasting certain unidentified military recruitment announcements "designed to encourage and increase enlistment in various branches of the military services" (J.A. 3)[8/] and by refusing to grant air time for petitioner's draft counseling message.[9/]

8/ Although petitioner never identified any of the military recruitment announcements broadcast, the Commission had before it, in the companion case of San Francisco Women For Peace, The G.I. Association, The Resistance, 24 F.C.C. 2d 156 (1970) (J.A. 31), examples of enlistment announcements. These are set forth in Appendix A to this brief.

9/ The video message is described by petitioner as follows (J.A.10):

> The film alternates between color and black and white sequences. It shows a pretty, young girl sad and alone, (in black and white) then happily enjoying the company of a young man (in color). The black and white scenes alternate with the color scenes, as a voice says the following:
>
> > - Remember your first love? . . . Christina spends her time trying to forget, but can't. For every draftee that goes off to war there is a Christina left behind - sometimes for good.

(Footnote Con't)

In support of this allegation, petitioner contended military recruitment announcements present one side of a controversial issue of public importance. First, the announcements imply that "a career in the armed forces is desirable, rewarding, and the best way to serve one's country". (J.A. 9) Second, "the question of military service [is] one of the most important domestic issues of the day...." (J.A. 9) As evidence of the public importance and controversality of the military service question, petitioner stated to the stations that his organization has a "three-hundred year history of deep pacifist conviction" (J.A. 9) and "the history of this and other nations is replete with controversy over military service." (J.A. 4) In his complaint to the Commission, he cited past "anti-conscription riots," unidentified "literature" and undisclosed "debates over whether the regimentation and brutalization of military life has lasting and socially undesirable effects" and Congressional debates dealing with the Selective Service System and the draft law. (J.A. 4-5). Specifically it was asserted that

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9/ (Footnote Con't)

The film ends and the following name and address appears:

Friends Peace Committee
2111 Florida Avenue, N. W.

Over this a voice says:

- There are legal alternatives to military service. You may be entitled to one of a number of deferments provided by law. For information write to this address.

the issue to which petitioner sought an opportunity to respond was "the desirability of regular military service" (J.A. 32).

Petitioner initially informed the stations complained against that his group "can help balance [the station's] presentation of this important matter by presenting the constitutional, legal, honorable, and . . . desirable alternatives to military service." (J.A. 9). Some time after his complaint to the stations, petitioner prepared a video message addressed to "every draftee" warning him of the obvious sacrifices of military service - temporary separation and possible death-and informing him of the availability of draft counseling services. (J.A. 10).

The stations notified petitioner that they did not regard his message as an appropriate format for discussing the issue of the draft (J.A. 12). They also stated that in their view the only issue raised by the recruitment announcements was "whether the United States at this time should maintain armed forces and, what is essentially the same thing, whether persons should volunteer for service" (J.A. 34); and that these were not regarded as controversial issues of public importance (J.A. 14). The stations did, however, offer time to petitioner to present his views in various formats other

than the proferred spot announcement:[10] an opportunity to appear on WMAL-TV's "regularly scheduled Public Affairs series--OUTLOOK--for the purpose of discussing the position of the Peace Committee" on the draft (J.A. 12), and to develop a series of programs on "WRC-TV's Sunday morning religious series" and to appear on its "Issues" panel discussion program in which a discussion of the draft would be "substantially the entire program." (J.A. 15). These offers were made pursuant to the stations' recognition that the draft question is a controversial issue of public importance.[11] They were, however, rejected by Professor Green.

In reviewing petitioner's allegations, the Commission held that petitioner had not shown to be unreasonable the stations' determination that the question of voluntary enlistment is not a controversial issue of public importance and thus the fairness doctrine was not triggered by the broadcast of recruitment announcements.[12] As to petitioner's draft

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10/ In his complaint to the Commission, petitioner failed to enclose a copy of WRC-TV's response, explaining that it had not as yet been received. The omitted response contained WRC-TV's reasons for refusing petitioner's request and contained two offers of time. For reasons of thoroughness, the Commission's staff contacted counsel for both petitioner and Station WRC-TV requesting copies of the station's response.

11/ Apparently an offer of time made by Station WTOP-TV was accepted (J.A. 4, 11).

12/ However, the Commission also stated that "In reaching the conclusion that no fairness doctrine violation has been demonstrated, we do not mean to imply that nothing connected with a public service announcement could bear upon a controversial issue of public importance. Such announcements, in particular instances, may present one side of a controversy. Here, we simply note that there is no indication that any such announcement (i.e., one presenting one side of a controversial issue of public importance) was broadcast by any station in the [Washington, D. C.] area." (J.A. 35).

counseling announcements, it was stated that the question of the draft is a controversial issue of public importance about which stations must present contrasting views, but the manner in which such views should be presented is left to the reasonable and good faith judgment of the licensee. (J.A. 35). With regard to the specific complaints against the stations the opinion concluded that "both stations, although they declined to broadcast the views urged by Professor Green and his group in the form of promotional spot announcements, have offered an opportunity for the presentation of such views in the context of substantive programming. Absent evidence that stations WMAL and WRC have failed in their overall programming to achieve fairness in their coverage of the controversial issue here involved (i.e., the draft), the Commission will not disturb the licensees' determination as to how to best inform the public of the various facets of issues of controversial public importance."[13/]

Petitioner did not file a petition for reconsideration but instead appealed directly to this Court.

13/ Reference was also made to a compansion case decided the same day San Francisco Women for Peace, supra, in which the same issue was discussed in somewhat greater detail. Reviewing the recruiting messages the Commission found that they were essentially no different than other similar public service announcements carried by broadcast stations which urged listeners to become teachers, firemen, policemen, or peace corps volunteers.

ARGUMENT

The questions before the Commission were two in number: (1) whether the stations complained against can be said to have acted reasonably and in good faith (a) in identifying the issues discussed in military recruitment announcements and (b) in determining that the issues were not controversial issues of public importance; and (2) whether the stations failed to present contrasting views on the question of the draft in their overall programming. Fairness Primer, supra, 40 F.C.C. at 599. The Commission found that these stations had not acted unreasonably with respect to the first question; nor had they failed to comply with the fairness doctrine with respect to the second question.

In this appeal, petitioner advances new evidence and legal contentions not previously presented to the Commission. His Argument I (Br. 11-22) contains new factual references not offered before.[14/] Moreover, petitioner failed to assert at the Commission level the following

14/ See footnotes in pp. 20-22 of petitioner's brief, e.g., "Catch-22" (1970); Falk, Vietnam War & Int'l Law, Vols. I and II (1969); Bates, ed., Poems of War Resistance; Styron, The Long March (1952); American Friends Service Comm., The Draft? (1968).

arguments: that the discretion given licensees in the area of the fairness doctrine is inconsistent with the public interest standard of the Communications Act and violates the First and Fifth Amendments.

In short, petitioner requests this Court to consider new evidence and legal arguments upon which the Commission has been given no opportunity to analyse and resolve. The impropriety of such a request was recognized by Congress when it specified in Section 405 of the Communications Act that a petition for rehearing is a condition precedent to judicial review where a party "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." See 47 U.S.C. 405; United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Presque Isle TV, et al. v. United States, 387 F.2d 502 (1st Cir. 1967). As this Court stated in Florida Gulfcoast Broadcasters, Inc. v. F.C.C., 122 U.S. App. D.C. 250, 252, 352 F.2d 726, 728 (1965):

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reason for its action." Unemployment Compensation Commission of Territory of Alaska v. Aragon, 329 U.S. 143, 155, 67 S. Ct. 245, 251, 91 L. Ed. 136 (1946); see also Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957).

In our view the only issue raised and decided below is whether the fairness doctrine requires that the stations which broadcast recruiting annoucements for the armed forces were obliged to give time to petitioner for the presentation of spot announcements opposing military service, especially where time was offered in other formats for the peititioner to air his views on the draft. Accordingly, this brief responds only to this question.

THE COMMISSION COULD REASONABLY FIND THAT NO VIOLATION OF THE FAIRNESS DOCTRINE OCCURRED WHEN THE STATIONS AFTER CARRYING RECRUITMENT ANNOUNCEMENTS DECLINED TO GIVE TIME FOR SPOT ANNOUNCEMENTS OPPOSING MILITARY SERVICE.

Congress has delegated to the Commission the responsibility for seeing that broadcast stations "operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). It is well-settled that judicial review of Commission action in this area is limited to whether the agency's order is unreasonable or in contravention of the statutory purpose. As recently stated in Eugene J. McCarthy v. F.C.C., 129 U.S. App. D.C. 56, 390 F.2d 471 (1968),

"In making this determination, 'this court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.'" Citing American Telephone & Telegraph Co. v. United States, 299 U.S. 232 (1936), and Udall v. Tallman, 380 U.S. 1 (1965); Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959); Philadelphia Broadcasting Co. v. F.C.C., 359 F.2d 282, 283-284 (D.C. Cir. 1966); K. Davis, Administrative Law Treatise, §5.03 (1958). "This is particularly true," the Court emphasized, "where the Commission has been assigned a responsibility of the kind here involved." Id.

A licensee, in applying the fairness doctrine, is called upon to make reasonable judgments[15/] in good faith in the facts of each situation, as to what question was discussed, whether the question is a controversial issue of public importance and how best to afford reasonable opportunity for

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15/ Petitioner's characterization (Br. 34) of the degree of discretion given licensees is inaccurate. In making its programming judgments, a licensee is required to act in good faith and make reasonable judgments. Petitioner omits this latter critically important qualification. This degree of discretion is necessary to allow licensees to carry out their obligations under the fairness doctrine. See Report on Editorializing, supra, 13 F.C.C. at 1251-1252. Hence it is clear that the Commission has not "delegated all responsibility to the licensee" allowing it to operate with "no standards" "virtually without accountability." (Br. 34) Moreover, as the decisions make clear, the result in the present case

(Footnote cont'd)

the presentation of significant contrasting views on that issue in its overall programming. Fairness Primer, 40 F.C.C.

15/ (Footnote cont'd) rests not on a reluctance by the Commission to disturb a questionable program judgment by the licensee but on an affirmative finding: "[W]e do not believe that the broadcast of Armed Forces recruitment messages . . . raises a controversial issue of public importance requiring presentation of conflicting viewpoints" (J.A. 18).

Contrary to petitioner's argument that the Commission has not laid down any standards of conduct (Br. 33-35), the Commission pointed out in the same report that "the standard of reasonableness and the reasonable approximation of a statutory norm is not an arbitrary standard incapable of administration or judicial determination, but, on the contrary, one of the basic standards of conduct in numerous fields of Anglo-American law." 13 F.C.C. at 1256. Significantly, petitioner does not suggest that the Commission's decisions applying this standard of reasonableness in the area of fairness doctrine complaints are not precise or do not provide complainants and licensees with a meaningful, factual articulation of a standard of conduct by which the Commission measures a licensee's compliance with the fairness doctrine. See Red Lion Broadcasting Co. v. F.C.C., supra, 396 U.S. at 395-396, in which the Supreme Court dismissed a similar vagueness argument with respect to the personal attack aspect of the fairness doctrine.

It would appear that petitioner's whole line of argument is grounded on a fallacious premise, i.e., that the mere possibility of administrative abuse requires abandonment of the standard used. The Commission, again in its report, stated that "[l]ike any other flexible standards of conduct, it is subject to abuse and arbitrary interpretation and application by duly authorized revising authority. But the possibility that a legitimate standard of legal conduct might be abused or arbitrarily applied by capricious governmental authority is not and cannot be reason for abandoning the standard itself." 13 F.C.C. at 1256. The instant appeal is evidence that a sufficient safeguard exists against any abuse of Commission discretion.

at 599.[16/] Here the Commission reviewed the complaint and responsive pleadings and concluded that no fairness violation had been established. It found that recruiting announcements did not trigger an obligation to present opposing views and that the draft, the issue to which petitioner's spot announcements were directed, while a controversial issue, was not one on which the stations had been shown to have been remiss in their obligation under the fairness doctrine. This we believe was an entirely reasonable exercise of discretion.

16/ The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

Report on Editorializing, supra, 13 F.C.C. at 1251-1252.

A. The Announcements Do Not Constitute One Viewpoint On An Issue Of Public Importance.

As petitioner concedes (Br. 22-23), the fairness doctrine does not apply unless that which the station discussed involved a controversial issue of public importance. If it can be reasonably said that no controversial issue of public importance was involved, then of course no fairness obligation arises. Mr. George R. Walker, 26 F.C.C. 2d 238 (1970).*/ In the instant case, WRC-TV decided (1) that the question raised by the military recruitment advertisements related to whether the United States should maintain armed forces and whether persons should voluntarily enlist in the military; and (2) that these questions were not controversial issues of public importance. The Commission reviewed petitioner's allegations, the station's responses thereto, and concluded that these judgments were reasonable and made in good faith.

In his complaint, petitioner alleged that the military recruitment advertisements presented the view that "a career in the armed forces is desirable, rewarding and the best way to serve one's country," and that "the question of military service" is a controversial issue of public importance. (J.A. 9.)

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*/ The Commission is constantly reexamining what subjects constitute controversial issues of public importance. For example, where an issue is the subject of an election, the issue is presumed to be a controversial issue of public importance, absent unusual circumstances. King Broadcasting Co., 23 F.C.C. 2d 41, 43 (1970). "It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process." Id. See Central Maine Broadcasting System, 23 F.C.C. 2d 45 (1970).

The ads are designed to persuade persons to voluntarily enlist in one or the other of the various services and thus to maintain and augment the nation's military forces. They do not on their face advocate or oppose any position on any current public issue. Moreover, petitioner expressly disavows any connection between the recruitment announcements and the war in Indochina or other aspects of the nation's military and foreign affairs (Br. p. 9). His position is the exceedingly broad one "that it is never desirable to enter military service for purposes of bearing arms" (Br. p. 12).

The stations determined and the Commission agreed that whether the United States should maintain armed forces or whether persons should enlist were not controversial issues of public importance. The Commission stated petitioner had failed to show or make a "reasonable indication that there is a significant controversy of public importance . . . " on these questions. (J.A. 34.) Before the stations petitioner merely stated, without factual support or explanation, that "the question of military service" is "one of the most important domestic issues of our day." (J.A. 9.) He did not elaborate or state what facet or facets of military service he thought

were controversial. He did not refer to the Vietnam War, the disarmament talks, etc. Petitioner's allegations were totally devoid of specificity at that juncture.[17/] Later, after becoming aware of the stations' rejections and reasons thereof, petitioner merely cited in support of his original claim the following references: past "anti-conscription riots," unidentified lay and professional literature, and legislative debates and bills on the draft. These general references were never documented to the Commission[18/] and are plainly inapposite in any event.

17/ On page 28 of his brief, petitioner states that WRC-TV "made no showing that [the enlistment question] was not a controversial issue of public importance." Petitioner implies that the burden of going forward is on the licensee. Such an allocation is, in the circumstances, improper. First, petitioner did not submit any evidence that the enlistment question was a controversial issue of public importance. All his "evidence" is relevant to a different question, i.e., the desirability of being drafted. Hence, the station had no duty to rebut irrelevant evidence. Second, it is impossible for the licensee to prove a negative. It cannot show that no controversy exists. However, petitioner could if one existed.

18/ The need for order in the administrative process dictates that a complainant fully set out the basis for his claim and all supporting evidence reasonably available to him. Petitioner had two opportunities to make such a showing. For some unexplained reason, he chose not to take advantage of those two opportunities. Yet he now asks the Court to review factual evidence for the first time. This he may not do. Compare Hale & Wharton v. F.C.C., __ U.S. App. D.C. __, 425 F.2d 556 (1970), where this Court stressed the need for specificity in making complaints under the fairness doctrine.

Military recruitment advertisements do not speak to the question of conscriptive participation in the military, but to voluntary service. Moreover, petitioner does not demonstrate how these references show there is a controversy over the question of the maintenance of armed forces. Petitioner's reference to Congressional debates and proposed bills deals with the draft and not with the questions of voluntary enlistment, the subject of the advertisements. It is clear from this that petitioner failed in his complaint to the Commission to rebut, with relevant support, the stations' reasoned denials and has not demonstrated here that the Commission's decision upholding the stations' judgment was arbitrary or capricious in light of the evidence in the record.

In sum, the fact that some individuals have personal convictions against the bearing of arms does not mean that advertisements seeking enlistments in the armed forces trigger a fairness doctrine duty on the part of broadcast stations to reflect the views of these individuals and groups. Whatever undesirable aspects of military life petitioner may invoke and whatever the depth of his conviction, the need to maintain forces is not, we submit, a subject of widespread public debate at this point in time. This is not to say that

petitioner should be silenced, and the stations involved have made no attempt to do so, but have indeed (as we show in the next section of the brief) afforded him opportunity to present his views. Surely, however, it was within the range of reason for the Commission to conclude that the recruiting announcements did not, for the reasons advanced below by petitioner, oblige stations under the fairness doctrine to present messages opposing military service; that it was indeed not unlike "similar recruitment messages for policemen, firemen, teachers, census enumerators, peace corp volunteers, etc." (J.A. 18).

B. The Offers Of Time Made To Petitioner Conclusively Demonstrated WMAL-TV And WRC-TV's Good Faith And Reasonableness In The Circumstances.

After holding that the broadcast of military recruitment announcements did not give rise to any independent fairness doctrine obligation to present petitioner's views on the desirability of military service, the Commission found that the messages petitioner sought to have broadcast focused on the general debate surrounding the draft question. In this regard, the Commission noted that Stations WMAL-TV and WRC-TV had offered petitioner's group time to appear on specific program series "on which [the group] would have an opportunity to present [its] views." (J.A. 34). In noting that the question of "non-military and honorable alternatives to service in the military are certainly of substantial interest to the public and, in the coverage of [the draft] issue, constitute a facet of a controversial issue of public importance to which a licensee shall afford broadcast opportunity" (J.A. 34-38), the Commission found that they have offered petitioner an opportunity to present views to the public "in the context of substantive programming." (J.A. 35).

The record evidences the following: WMAL-TV iterated its offer to petitioner to appear on its "regularly scheduled Public Affairs series--OUTLOOK--for the purpose of discussing the position of the Peace Committee" on the issue of the draft. (J.A. 12). Petitioner states that he refused the offer because of its "disingeniousness." (J.A. 4). Yet, he appeared on a pre-filmed 15-minute interview on the same program, "OUTLOOK," which was broadcast by WMAL-TV on July 26, 1970.

With respect to WRC-TV, it conceded the controversiality of the draft question offering petitioner and his organization an opportunity to present their views on "a series of programs on WRC-TV's Sunday morning religion series" and on its "Issues" panel discussion program in which a discussion of the draft would be "substantially the entire program." (J.A. 15). Without attempting to present his views on one or both of these programs, petitioner rejected these offers as "clearly inadequate." 19/ (Br. 7).

19/ WTOP-TV offered him "a series of interviews of members of the Friends' Peace Committee which would explore the committee's views, the program and campaign of which the proposed announcement is a part, and related subjects." (Emphasis added.) (J.A. 11). Apparently satisfied with the offer, petitioner did not press his request to have his announcements broadcast by WTOP-TV. Nor did he include WTOP-TV in his complaint because WTOP-TV "offered an alternative which it felt provided a reasonable format in which to present [his] point of view. . . ." (Emphasis added.) (J.A. 4).

Petitioner had not shown, nor even alleged, that his acceptance would not enable the public to become better informed on the issue of the desirability of military service.[20/] Nor has he shown that the programs offered do not give the public "suitable access to social, political, esthetic, moral,and other ideas and experiences . . . ," Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. at 390. Absent such a showing, "the Commission will not disturb the licensee's judgment as to how to best inform the public of the various facets of issues of controversial public importance." (J.A. 35). It is clear from the stations' offers that they acted reasonably and in good faith in the circumstances.

CONCLUSION

For the foregoing reasons the Commission's order should be affirmed.

Respectfully submitted,

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January 22, 1971

20/ Nor does petitioner contend that these stations are not treating the issue of the Vietnam war or the draft fairly in their overall programming. Certainly these controversial issues are factors to be considered in determining whether military service is desirable.

APPENDIX A

MILITARY RECRUITMENT SPOTS DISTRIBUTED FOR BROADCAST DURING OCTOBER - DECEMBER 1969 AND JANUARY 1970

The following spots were distributed by the U.S. Army and the U.S. Marine Corps for broadcast during October-December 1969 and January 1970. The first two spots are taken from Army RPI 702, January 1970. The next Marine Corps spot is taken from NAVMC 6858. The remaining spots are transcribed from two U.S. Marine Corps records: "The Celebrities Speak Out, Volume 2, Part 3," and "Ask a Marine: Public Service Recruiting Spots, Volume 1, Part 4." For the purpose of this complaint the spots have been numbered consecutively. Spots urging the enlistment of women have been omitted.

SPOT NUMBER ONE

ANNOUNCER: ARE YOU A YOUNG MAN WHO LIKES A CHALLENGE AND WHO LIKES TO DO HIS BEST AT ANYTHING HE DOES? WELL IF YOU ARE...THE UNITED STATES ARMY NEEDS YOU. LIFE IN THE ARMY DEMANDS THE VERY BEST YOU HAVE... AND IN RETURN THE ARMY OFFERS YOU EDUCATIONAL OPPORTUNITIES...TRAVEL...GOOD PAY...AND MOST IMPORTANT...THE OPPORTUNITY TO MAKE A REALLY WORTHWHILE CONTRIBUTION TO THE SECURITY OF YOUR COUNTRY. FOR ALL THE FACTS...VISIT YOUR LOCAL ARMY RECRUITER. YOUR FUTURE...YOUR DECISION...CHOOSE ARMY.

SPOT NUMBER TWO

ANNOUNCER: IN EVERY MAN THERE IS A TALENT...A HIDDEN ABILITY... A KNACK...A GIFT. CALL IT WHAT YOU WILL...THE UNITED STATES ARMY WILL BRING IT OUT INTO THE OPEN. WE CAN OFFER YOU PROVED JOB TRAINING TECHNIQUES THAT RANK AMONG THE FINEST IN THE WORLD. OUR INSTRUCTORS KNOW HOW TO ENCOURAGE AND DEVELOP EVERYTHING YOU'VE GOT. DON'T WASTE YOUR TALENT. WE CAN OFFER YOU JOB TRAINING IN HUNDREDS OF INTERESTING AND CHALLENGING COURSES. DO WHAT YOU'VE ALWAYS WANTED TO DO...AND DO IT AS A MEMBER OF THE UNITED STATES ARMY. SERVE YOUR COUNTRY WHILE YOU LEARN A VITAL AND REWARDING SKILL. YOU FUTURE...YOUR DECISION...CHOOSE ARMY.

SPOT NUMBER THREE

ANNOUNCER: YOUNG MAN...IF YOU WILL BE GRADUATING FROM HIGH SCHOOL IN THE NEAR FUTURE, YOU SHOULD KNOW ABOUT AN EIGHT-WEEK COURSE THAT COULD BE ONE OF THE BIGGEST TURNING POINTS IN YOUR LIFE. IT'S THE EIGHT WEEKS NEW MARINES SPEND IN MARINE CORPS BASIC TRAINING. EIGHT WEEKS THAT MOLD THEM IN BODY, MIND AND SPIRIT...INTO MEN THE MARINE CORPS IS PROUD TO CALL ITS OWN. AND, THE

CORPS IS NOT THE ONLY ONE WHO IS PROUD...YOU WILL BE TOO. IN YOUR PROUD UNIFORM, YOU ARE A NEW MAN WITH MUSCLES THAT RESPOND INSTANTLY, AND A NEW SELF-CONFIDENCE THAT WILL LAST THE REST OF YOUR LIFE. NOW, YOU STAND READY TO HANDLE ANY SITUATION...OVERCOME ANY OBSTACLE BECAUSE MARINE TRAINING HAS BROUGHT OUT THE BEST IN YOU. THE WAY FOR YOU TO FIND OUT ABOUT HOW YOU CAN BECOME A PART OF THIS ELITE MILITARY ORGANIZATION IS TO...ASK A MARINE. A GOOD ONE TO ASK IS YOUR NEARBY MARINE CORPS REPRESENTATIVE. SEE HIM TODAY.

SPOT NUMBER FOUR

THIS IS JACK WEBB. AS SERGEANT JOE FRIDAY, I PORTRAY A POLICE OFFICER WHOSE OBJECTIVE IS THE PROTECTION OF ONE OF OUR LARGEST CITIES. THE REAL LIFE ROLE OF OUR U.S. MARINES IS THE PROTECTION OF OUR NATION AND OUR IDEALS. THE RIGHTS OF FREEDOM LOVING PEOPLE ARE BEING CHALLENGED IN MANY PARTS OF THE WORLD. IF YOU WANT TO JOIN THE FIGHT FOR FREEDOM AND SERVE YOUR NATION WITH PRIDE, JOIN THE UNITED STATES MARINES. CALL YOUR MARINE REPRESENTATIVE TODAY.

SPOT NUMBER FIVE

THIS IS FRANK BLAIR SPEAKING TO YOUNG MEN FACING A MILITARY OBLIGATION. AS A FATHER, I WAS PLEASED WHEN MY SONS THOMAS AND JOHN TOLD ME THEY WANTED TO BECOME MARINES. THEY TOLD ME THAT THERE WAS MORE THAN ONE WAY TO LOOK AT AN OBLIGATION: TO CONSIDER IT SOMETHING YOU HAVE TO DO, OR AS AN OPPORTUNITY TO GROW AS AN INDIVIDUAL. HOW ABOUT YOU? ARE YOU READY TO DEVELOP IN BODY, MIND AND SPIRIT? FIND OUT THE DETAILS FROM YOUR MARINE CORPS REPRESENTATIVE TODAY.

SPOT NUMBER SIX

THIS IS FORMER MARINE FIRST LIEUTENANT RITCHIE GUERIN, AND NOW COACH OF THE ATLANTA HAWKS, WITH A SPECIAL MESSAGE FOR YOU COLLEGE MEN. IF YOU'RE LOOKING FOR A CHALLENGE, THE MARINE CORPS HAS ONE FOR YOU. THE CORPS GOES OUT OF ITS WAY TO MAKE IT ANYTHING BUT EASY TO BECOME A MARINE CORPS OFFICER. WHY? BECAUSE THE DAY YOU PIN ON THE GOLD BARS OF A MARINE SECOND LIEUTENANT, THE CORPS CAN SAY THAT THAT MARINE OFFICER KNOWS HOW TO LEAD MEN AS WELL AS ANY OFFICER CAN. FIND OUT IF YOU HAVE WHAT IT TAKES TO BECOME A MARINE CORPS OFFICER. SEE YOUR MARINE CORPS REPRESENTATIVE TODAY.

SPOT NUMBER SEVEN

THIS IS JOHN GARY WITH A MESSAGE FROM MY OLD OUTFIT--THE UNITED STATES MARINE CORPS. ASK YOUR LOCAL MARINE CORPS REPRESENTATIVE ABOUT OPPORTUNITIES IN THE CORPS. TODAY.

SPOT NUMBER EIGHT

I'M JONATHAN WINTERS WITH A SPECIAL MESSAGE FOR HIGH SCHOOL GRADUATES. WHEN THE MARINE CORPS SAYS IT BUILDS MEN, THAT DOESN'T MEN IT'S LOOKING FOR 98 POUND WEAKLINGS TO MOLD INTO A MOUNTAIN OF MUSCLE. PHYSICAL FITNESS IS AN IMPORTANT PART OF MARINE CORPS TRAINING. EQUALLY IMPORTANT IS GROWTH IN MIND AND SPIRIT. MARINE CORPS TRAINING GIVES YOU NEW CONFIDENCE IN YOURSELF, AND YOU'LL BE PROUD OF WHAT YOU'VE ACCOMPLISHED. THE COMPLETE MAN IS WHAT THE MARINE CORPS WANTS. IF YOU THINK YOU HAVE THE BASIC INGREDIENTS, TALK TO THE NEAREST MARINE CORPS REPRESENTATIVE. SEE HIM TODAY.

SPOT NUMBER NINE

THIS IS MARINE RESERVIST ED McMAHON WITH AN IMPORTANT MESSAGE FOR YOU HIGH SCHOOL MEN. IF YOU WOULD LIKE THE RESPONSIBILITY OF KEEPING A $2 MILLION PLUS JET AIRCRAFT IN TOP FLYING TRIM OR LEARNING THE INTRICATE MECHANISMS OF A HELICOPTER OF THE POWER PLANTS OF A MULTI-ENGINE TRANSPORT, THEN CONSIDER A CAREER AS A U.S. MARINE. AS A MARINE YOU WILL LEARN JUST WHAT IT TAKES TO BUILD A MAN IN BODY, MIND AND SPIRIT. IT MAKES SENSE TO CHECK WITH YOUR NEAREST MARINE REPRESENTATIVE ABOUT THE OPPORTUNITIES FOR YOU IN TODAY'S MODERN MARINE CORPS. WHY NOT DO IT TODAY?

SPOT NUMBER TEN

THIS IS FORMER U.S. SENATOR PAUL DOUGLAS OF ILLINOIS. DURING MY YEARS OF SERVICE IN THE CONGRESS OF THE UNITED STATES I WAS GRATEFUL FOR THE TRAINING WHICH I EXPERIENCED IN ANOTHER KIND OF SERVICE...THE U.S. MARINE CORPS. ODDLY ENOUGH I WAS FIFTY YEARS OLD BEFORE I HAD AN OPPORTUNITY TO BENEFIT FROM MARINE TRAINING. AND THEY STILL TELL ME I WAS THE OLDEST MAN TO GO THROUGH BOOT CAMP AND SERVE IN THE FRONT LINES. I MUST SAY I DIDN'T FEEL FIFTY AT THE TIME. MARINE TRAINING HAD SEEN TO THAT. IT'S TOUGH, BUT THEN NOTHING WORTHY OF ACCOMPLISHMENT IS EASY...AND MEN LIKE A LIFE THAT HOLDS HARDSHIP AND DANGER IN IT. YOU YOUNG MEN WHO ARE RECENT HIGH SCHOOL GRADUATES COULDN'T FIND A WAY TO GET OFF TO A BETTER START THAN WITH MARINE TRAINING...AND THE PRIDE OF SERVING WITH ONE OF THE TRULY NOBLE MILITARY ORGANIZATIONS IN THE WORLD. SE YOUR MARINE REPRESENTATIVE TODAY.

SPOT NUMBER ELEVEN

THE MARINES HAVE JUST THREE WORDS FOR A YOUNG MAN--BODY, MIND AND SPIRIT. ASK A MARINE.

SPOT NUMBER TWELVE

ALMOST ANYBODY CAN BE A MARINE. ALMOST ANYBODY WHOSE PASSED HIS 17th BIRTHDAY. ALMOST ANYBODY WHO REALLY WANTS TO PROVE HIMSELF IN THE TOUGHEST CONDITIONS.
REFRAIN: ASK A MARINE

ASK A MARINE WHAT IT TAKES TO BE A MARINE. HE'LL TELL YOU ALMOST ANYBODY CAN BE A MARINE. ALMOST ANYBODY WHO CAN'T WAIT TO PROVE HE IS A MAN.
REFRAIN: ASK A MARINE.

SPOT NUMBER THIRTEEN

SHOULD YOUR BOY JOIN THE U.S. MARINES? ASK A MARINE...HE'LL TELL YOU IT REALLY DEPENDS ON THE BOY, WHAT KIND OF BOY HE IS, WHERE HE WANTS TO GO IN THIS WORLD, WHAT HE WANTS TO DO WITH HIS LIFE, AND HOW SOON HE WANTS TO BE A MAN. BECAUSE THIS MUCH WE KNOW: IT WILL TAKE HIM EIGHT WEEKS TO GO THROUGH MARINE BOOT CAMP. AND ON THE DAY HE GRADUATES YOU'LL SEE THEM ALL MARCHING BY. AND FOR A MOMENT YOU WON'T BE ABLE TO PICK HIM OUT BECAUSE YOU'LL BE LOOKING FOR A BOY. AND FOR THE FIRST TIME IN HIS LIFE HE'LL BE SHOWING YOU A MAN. ASK A MARINE.
REFRAIN: ASK A MARINE.

SPOT NUMBER FOURTEEN

THERE ARE NO BOSS' SONS IN THIS OUTFIT. IF YOU WANT TO BE A MARINE LIEUTENANT, NOBODY IS GOING TO HAND YOU GOLD BARS ON A SILVER PLATTER. YOU'LL BE TRAINED BY AN EAGLE-EYED MARINE INSTRUCTOR. A MAN WHO KNOWS EVERY ROPE. THE FIRST TIME YOU LAY EYES ON HIM YOU'LL FEEL LIKE A ROOKIE QUARTERBACK GETTING THE MESSAGE FROM ALINEBACKER WITH TEN YEARS UNDER HIS BELT. AND THE FIRST TIME HE'LL LAY EYES ON YOU HE'LL HAVE JUST ONE QUESTION ON HIS MIND: ARE YOU A MAN WHO CAN LEAD MEN? ASK A MARINE... ASK A MARINE OFFICER WHAT IT TAKES TO BE A MARINE LIEUTENANT. HE'LL TELL YOU IT TAKES MORE THAN A COLLEGE DEGREE. IT TAKES EVERYTHING YOU'VE GOT.
REFRAIN: ASK A MARINE.

SPOT NUMBER FIFTEEN

SOMETIME IN THE 70'S YOU'LL BE ABLE TO FLY A COMMERICAL AIRLINER 1800 MILES PER HOUR. BUT MAYBE YOU WANT A SUPERSONIC ALL TO YOURSELF. AND MAYBE YOU HAVE WHAT IT TAKES TO GO FROM A COLLEGE MAN TO A MARINE AVIATOR. ASK A MARINE. ASK HIM WHAT IT MEANS TO BE A MARINE OFFICER ON THE GROUND, AND A MARINE OFFICER IN THE AIR. HE'LL TELL YOU IT'S LIKE YOU'RE A LITTLE OUT OF THIS WORLD.
REFRAIN: ASK A MARINE.

SPOT NUMBER SIXTEEN

IT'S A DAY YOU CAN'T PUT INTO WORDS. YOU TRY TO COMPARE IT WITH THE DAY YOU GRADUATED FROM HIGH SCHOOL, BUT THERE'S NO COMPARISON. BECAUSE SOMEHOW THE DAY YOU GRADUATED FROM HIGH SCHOOL, YOU WERE STILL JUST ANOTHER GUY, AND ON THIS DAY, YOU'RE SOMETHING ELSE. YOU LOOK TALLER THAN YOU DID BECAUSE YOU STAND TALLER. YOU LOOK PROUD BECAUSE YOU ARE PROUD. AND NO WONDER...YOU'VE JUST GONE THROUGH THE TOUGHEST EIGHT WEEKS A GUY EVERY HAD. AND IF YOU DIDN'T HAVE WHAT IT TAKES, YOU WOULDN'T BE STANDING WITH THE REST

OF THEM, YOU WOULDN'T BE WEARING THE SAME UNIFORM. ASK A MARINE. ASK A MARINE WHAT IT MEANS TO GRADUATE FROM MARINE BOOT CAMP. HE'LL TELL YOU. IT'S A DAY TO REMEMBER FOR THE REST OF YOUR LIFE. BECAUSE THAT'S THE DAY THEY SEPARATE THE MEN FROM THE BOYS.
REFRAIN: ASK A MARINE.

SPOT NUMBER SEVENTEEN

ASK A MARINE OFFICER WHAT IT MEANS TO BE A MARINE LIEUTENANT. ASK HIM WHAT IT TAKES TO LEAD A MARINE PLATOON. HE'LL TELL YOU IT'S ABOUT THE TOUGHEST POST-GRADUATE COURSE A COLLEGE MAN EVER HAD. HE'LL TELL YOU IT TAKES EVERY OUNCE OF LEADERSHIP YOU'VE GOT, BECAUSE A FIGHTING MAN JUST DOESN'T COME ANY FINER THAN A MARINE. AND IF YOU CAN LEAD A PLATOON OF MARINES, YOU CAN LEAD ANYBODY. ANYWHERE, ANYTIME.
REFRAIN: ASK A MARINE.

SPOT NUMBER EIGHTEEN

WE UNDERSTAND YOU'RE LOOKING FOR A MAN'S JOB. WELL, WE JUST MAY HAVE ONE. WHO ARE WE? WE'VE BEEN IN BUSINESS SINCE 1775. WE'RE LOCATED IN CLOSE TO 200 PLACES AROUND THE WORLD. WE'LL PAY WHILE WE ARE TRAINING YOU. GIVE YOU THIRTY DAYS OFF PER YEAR. GIVE YOU A CHANCE TO CONTINUE YOUR EDUCATION. AND WE'LL BUILD YOU A MAN. WE'LL BUILD YOU A MARINE. AND THAT MAN AND THAT MARINE WILL BE YOU.
REFRAIN: ASK A MARINE.

NO. 24,470

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID GREEN, Individually and as Chairman of the Peace Committee,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

On Petition To Review an Order of the Federal Communications Commission

BRIEF FOR INTERVENOR NATIONAL BROADCASTING COMPANY, INC.

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COUNTER STATEMENT OF ISSUES

1. Was the Federal Communications Commission unreasonable in concluding that Station WRC-TV, which had broadcast armed forces voluntary recruiting announcements, did not act in bad faith or unreasonably in refusing to provide free time to petitioners for the broadcast of anti-draft spot announcements submitted by petitioners in response to such recruiting announcements, when petitioners admit that such recruiting announcements did not raise or discuss the issue of the draft?

2. Disregarding the fact that petitioners sought free time to discuss an issue which they admit was not raised by the recruiting announcements in question, were both Station WRC-TV and the Federal Communications Commission unreasonable in concluding that announcements soliciting voluntary recruitment in the Armed Forces of the United States do not present a controversial issue of public importance so as to require free time to respond thereto?

3. Does the Constitution guarantee petitioners access to broadcasting facilities at any time that petitioners decide that in their view an issue they wish to raise is a controversial one of public importance?

INDEX

TABLE OF CITATIONS

CASES:

*Cases or authorities chiefly relied upon are marked by asterisks.

CONSTITUTION AND STATUTES:

IN THE

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NO. 24,470

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Intervenor.

On Petition To Review an Order of the Federal Communications Commission

---

BRIEF FOR INTERVENOR NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. (hereinafter "NBC"), licensee of television station WRC-TV, submits this brief as intervenor in support of the position of respondents herein. NBC was granted leave to intervene by order of this Court dated October 29, 1970.

STATEMENT OF THE CASE

The proceedings leading to the adoption of the ruling here under attack were initiated by petitioners' filing with the Federal Communications Commission (hereinafter the "Commission") a complaint against two Washington, D.C. television stations, WRC-TV and WMAL-TV.

Prior to filing the complaint, petitioners wrote to WRC-TV, WMAL-TV and WTOP-TV, another television broadcasting station in the Washington area, requesting "free air time to rebut the claim made by the numerous military recruitment advertisements presented on your station that a career in the armed forces is desirable, rewarding, and the best way to serve one's country." (App. 9)*

The announcements which petitioners sought free time to rebut were those announcements furnished to stations by the United States Armed Forces, which are designed to encourage and increase voluntary enlistment in various branches of the military services (App. 3). These announcements are carried by stations, without charge to the Armed Forces, as a public service.

Petitioners' letters were followed by phone conversations and visits with each licensee during which the licensees sought to ascertain both (i) the specific issue of a controversial nature which petitioners felt was being discussed on the air and (ii) petitioners' statement of contrasting viewpoints which they wished to present. In response to the licensees' requests, petitioners submitted a proposed announcement[1] as their presentation of a fair response to

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* References so designated are to pages in the Appendix; references to "Pet. Br." are to Petitioners' Brief.

[1] The text of petitioners' announcement is as follows: "... Christina spends her time trying to forget, but can't. For every draftee that goes off to war there is a Christina left behind—sometimes for good ... There are legal alternatives to military service. You may be entitled to one of a number of deferrments [sic] provided by law. For information write to this address ..." (App. 10)

the issues they felt were raised by the military recruitment messages. The spot announcement submitted by petitioners did not deal with voluntary military recruitment but rather dealt with the draft and deferments from the draft.

Station WTOP-TV declined to broadcast petitioners' proffered spot announcement but stated that it would be interested in broadcasting interviews with members of the Peace Committee in the station's news programs and offered as well the opportunity to participate in a half-hour program which would explore in depth the Friends' peace campaign (App. 11).[2]

Station WMAL-TV declined to broadcast the announcement but did offer petitioners an opportunity to appear on "Outlook," a regularly scheduled public affairs series. (App. 12).

Station WRC-TV similarly declined to broadcast the announcement since, in its view, the proposed announcement was an expression of views opposed to the draft and WRC-TV stated that it already was giving sufficient coverage in its news and discussion programs to views opposed to the draft. WRC-TV went on to note that those recruiting announcements which it did broadcast did not constitute a discussion of a controversial issue of public importance since there is no substantial controversy in the community it serves over the need for, or desirability of, United States armed forces or the voluntary recruitment of persons to serve in the armed forces. Based on these determinations, WRC-TV concluded that its broadcast of recruiting an-

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[2] The record does not indicate whether or to what extent any such programs were actually broadcast. Nor does the record indicate anything further about the nature or format of the proposed programming. Thus, petitioners' reference in its brief to "prime-time panel shows" and the Martin Agronsky Show (Pet. Br. p. 6) are unsupported by the record.

nouncements did not require it to broadcast the anti-draft spot announcement offered by petitioners (App. 14).

Thereafter petitioners filed their complaint against WRC-TV and WMAL-TV and stated that the military recruitment announcements present the viewpoint that service in the military is desirable, rewarding, and the way to serve one's country (App. 5). The complaint sought time to inform the public on "alternatives" to military service and characterized the complaint as arising under the fairness doctrine because of the licensees' "refusal to grant air time for announcements in the public interest on the subject of alternative military service." (App. 3). Continuing, the complaint characterized the issue as "the desirability of regular military service even were there no war raging half a world away [Vietnam]." (App. 6).

Subsequent to the filing of the letter complaint, the staff of the Commission, in the exercise of its investigative functions, initiated inquiry with, *inter alia*, counsel for NBC (licensee of WRC-TV) (App. 15) and counsel for petitioners (App. 16). The Commission was informed by NBC's counsel that WRC-TV had in fact replied in writing to the petitioners, stating its position on petitioners' request[3] and that WRC-TV had also offered petitioners the opportunity for the Society of Friends to develop a series of discussion programs to be carried by the station and the opportunity to appear on a regularly scheduled panel-discussion program. WRC-TV also informed the Commission that neither Professor Green nor the Society of Friends had expressed any further interest in either developing a series of programs for WRC-TV or in appearing on the program offered by WRC-TV as a means to express their views and beliefs. (App. 15).

[3] The Commission's policy is to review the judgment of licensees. Petitioners' complaint was filed before receipt of WRC-TV's written reply. The Commission naturally wished to obtain a copy of that reply.

Thereafter, on June 4, 1970, the Commission released the ruling upon which the instant petition for review is based. The Commission upheld the licensees' judgment to reject petitioners' claim that only one side of a controversial issue of public importance had been broadcast by the licensees and refused to find that judgment unreasonable or in bad faith. The Commission stated that to find the licensee's judgment arbitrary "there must be a showing or reasonable indication that there is a significant controversy of public importance on whether the United States at this time should maintain armed forces, and, what is essentially the same thing, whether persons should volunteer for service in the armed forces." (App. 34). The Commission concluded that it could not find unreasonable the licensee's judgment that that issue was not a controversial issue of public importance. The Commission further stated that absent specific demonstration to the contrary, it would not accept petitioners' premise that such announcements promoting voluntary military recruitment portray military service as "the only way to honorably serve one's country." (App. 34).

The Commission noted that the announcement which petitioners sought to have broadcast did not deal with the issue of whether there should be armed forces, but rather focused on the draft. The Commission stated that on the draft issue, "non-military and honorable alternatives to service in the military are certainly of substantial interest to the public and, in the coverage of this issue, constitute a facet of a controversial issue of public importance to which a licensee should afford broadcast opportunity, as a part of his obligation to inform the public." (App. 34, 35). Continuing, the Commission stated "[t]he licensees here are covering this issue. . . ." (App. 35).

The Commission declined to disturb each licensee's judgment, and determined that no further action was warranted at that time (App. 35).

SUMMARY OF ARGUMENT

The regulatory scheme envisioned by the fairness doctrine requires licensees, in their presentation of views on controversial issues of public importance, to make reasonable judgments in good faith as to whether a controversial issue of public importance is involved, what viewpoints should be presented and what format should be used for the presentation of those views. In reviewing complaints against licensees, the Commission's role is to determine whether the licensee acted reasonably and in good faith.

The record amply demonstrates that Station WRC-TV acted reasonably and in good faith when it determined that its broadcast, without charge, of announcements for voluntary enlistment in the armed forces, which petitioners admit do *not* raise the issue of the draft, did not obligate the station to grant free air time for the broadcast of anti-draft announcements submitted by petitioners. There is adequate basis for the Commission's concluding that in refusing free air time the licensee did act reasonably and in good faith.

There is no dispute that the question of the draft is a question of public importance and the record shows that WRC-TV has devoted substantial program time to that subject. Indeed, the station offered petitioners the opportunity to present their views in the context of substantive programming.

But even disregarding the fact that petitioners sought air time for anti-draft announcements and assuming that the question raised by the voluntary recruitment announcements is the desirability of regular military service, as petitioners now assert on appeal, that question is not one of controversial public importance. Given existing world tensions, hardly anyone would seriously contend that the United States should unilaterally disarm itself and demobilize all its armed forces, a result which would inevitably

follow from a discontinuance of compulsory and voluntary recruitment.

Contrary to petitioners' argument, the Constitution does not guarantee them free air time to discuss their views. The regulatory system established under the Communications Act achieves a balance between the constitutional rights of petitioners and broadcast licensees, and absent a clear abuse of discretion, the licensee's reasonable good faith determination under the fairness doctrine that petitioners are not entitled to free air time should stand. Petitioners' contention that before refusing to allow anyone to broadcast his views a licensee be required to make an affirmative showing to the Commission that those views are not related to a matter of public importance discussed on the licensee's facilities would, if adopted, cast the Commission in the role of a censor, in violation of the express language of the Communications Act.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION WAS NOT UNREASONABLE IN CONCLUDING THAT STATION WRC-TV DID NOT ACT UNREASONABLY IN REFUSING TO PROVIDE TIME TO PETITIONERS

A. The Regulatory Scheme of the Fairness Doctrine Directs the Licensee to Make Reasonable Judgments in Good Faith and the Commission's Role Is to Determine Whether the Licensee Acted in Good Faith and Not Arbitrarily.

The Communications Act of 1934, 47 U.S.C. §1 *et seq.*, imposes an obligation on broadcast licensees, where they have presented one view on controversial issues of public importance to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

(47 U.S.C. § 315(a)). This obligation, commonly known as the fairness doctrine, imposes on licensees the broad duty to insure fairness in the presentation of controversial issues of public importance. Under established Commission procedures, the licensee is called upon to exercise his best judgment in determining subjects to be considered, format of the programs and the spokesmen for each point of view.

As stated by the Commission in 1949:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." (*Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 P & F Radio Reg. 1901, 1907 (1949)) [hereinafter cited as the *Report on Editorializing*]

Again, as further stated by the Commission in 1964:

> ". . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." (*Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 2 P & F Radio Reg. 2d 1901, 1904 (1964) [hereinafter cited as the *Fairness Primer*]

Thus, broadcasters have wide discretion in complying

with the fairness doctrine. The Commission does not seek to establish a rigid formula for compliance, and the mechanics of achieving fairness will necessarily vary with the circumstances. *Mid-Florida Television Corp.*, 4 P & F Radio Reg. 2d 192, 195 (FCC 1964). Unlike the "equal opportunities" provision of Section 315 of the Communications Act, which deals with legally qualified candidates for public office, the question under the fairness doctrine is one of the reasonableness of the station's action and not whether absolute equality in allocation of time has been achieved. What is required is that the broadcaster provide a reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance on an overall basis. *Citizens Against Proposition 15*, 3 P & F Radio Reg. 2d 777, 778 (FCC 1964). Thus, in reviewing the actions of licensees in this area, the role of the Commission is not to substitute its judgment for that of the licensee as to programming decisions but to ascertain whether the licensee can be said to have acted reasonably and in good faith. *Mrs. Madalyn Murray*, 5 P & F Radio Reg. 2d 263, 264 (FCC 1965). *See also Letter to Oren Harris*, 3 P & F Radio Reg. 2d 163, 167 (FCC 1963).

B. Station WRC-TV Was Not Obligated to Provide Free Time for the Broadcast of Anti-draft Announcements in Response to Voluntary Military Recruiting Announcements, When Petitioners Admit that Such Announcements Do not Raise the Issue of the Draft and When Station WRC-TV Has Provided Adequate Coverage of Anti-draft Views.

While petitioners never identified a particular announcement about which they complained to either Station WRC-TV or the Commission,[4] there is no dispute before this

[4] While the Commission has stated that it expects fairness complaints to include the identification of the particular program on which the complaint is based (*Fairness Primer, supra*), petitioners failed to identify any such program but merely made general allegations of content.

Court that the announcements about which petitioners complain do not raise the issue of the draft but rather promote voluntary enlistment. Indeed, in their brief herein, in arguing that the Commission misconstrued the issue presented by the military recruiting announcements as being the issue of the draft, petitioners characterize the Commission's alleged construction[5] that the draft issue was raised, as being arrived at by "some incredible schizophrenia". (Pet. Br. p. 14)

Yet, when petitioners were asked to submit their proposed spot announcement in response to the announcements about which they were complaining, they submitted an announcement directly aimed at the draft and deferments therefrom.[6] If there is present any "incredible schizophrenia", it is on the part of petitioners and not Station WRC-TV or the Commission.

Station WRC-TV properly characterized the issue raised by the recruiting announcements as raising the question of "the need for and desirability of United States armed forces at this time or the voluntary recruitment of people to serve in the armed forces." (App. 14). The Commission similarly properly interpreted the recruiting announcements, characterizing the issue as "whether the United States at this time should maintain armed forces and, what is essentially the same thing, whether persons should volunteer for service in the armed forces." (App. 34)

Thus, only petitioners misconstrued the nature of the recruiting advertisements (a position since changed in this appeal) when they submitted an anti-draft announcement. Their proposed announcement clearly focused on the draft, and deferments from the draft, referring to a "draftee"

[5] As set forth below under Point I(E), *infra*, the Commission did not misconstrue the issue raised by the military recruiting announcements.

[6] For text of petitioners' proposed announcement, *see* footnote 1, p. 2.

who goes "off to war" and "deferments" (a word which has relevance only to the draft), rather than on recruitment and voluntary service in the armed forces.[7] Both WRC-TV and the Commission recognized that the issue of the draft was a controversial issue of public importance. However, this issue was not raised by the voluntary recruiting messages broadcast by WRC-TV. Therefore, the refusal by WRC-TV to carry the anti-draft announcement proffered by petitioners as the statement of a contrasting viewpoint to the recruiting announcements was not unreasonable. *See Dr. Carl McIntire,* 1 P & F Radio Reg. 2d 985 (FCC 1964) in which the Commission held that equal time was not required where matters which complainant wished to discuss were not mentioned in the program in question. *See also Dr. M. T. Mehdi,* 6 P & F Radio Reg. 2d 123 (FCC 1965).

C. Disregarding the Fact that Petitioners Sought Free Time to Discuss an Issue Admittedly Not Raised by the Recruiting Advertisements, that Is, the Draft, the Commission Was Not Unreasonable in Concluding that Station WRC-TV Acted Reasonably in Concluding that the Desirability of Voluntary Military Service Is Not a Controversial Issue of Public Importance.

The sole issue before this Court is the Commission's reasonableness in upholding Station WRC-TV's refusal to allow petitioners free time for the broadcast of anti-draft announcements. By the submission of anti-draft announcements, petitioners identified the draft as the issue they thought to be controversial. The station stated that it had

[7] In a belated attempt to avoid its obvious significance, petitioners now claim that their proffered announcement was hastily prepared. (Pet. Br. p. 6). The record does not contain any support for this statement. Moreover, petitioners initially attached enough importance to their proposed announcement copy to formally annex it to their complaint to the Commission (App. 3, 10), at which time they still apparently believed it expressed their view on the issue involved.

devoted adequate time to that issue in regular programming and hence refused to accord free time for petitioners' spot announcements.[8]

Petitioners now contend that the desirability of military service or, put another way, voluntary enlistment in the military, is a controversial issue of public importance. Petitioners' argument is predicated completely on an attempted analogy to the smoking of cigarettes and petitioners suggest that the dangers of military service (*i.e.*, death or injury) are so akin to smoking that a vast campaign of announcements should be commenced urging Americans not to enlist voluntarily for military service in the United States Armed Forces. Essentially, petitioners contend that the spot announcement approach adopted for cigarettes in the case of *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), must control here.

The ruling in *Banzhaf* is completely inapposite to this case.

Contrary to the factual situation in *Banzhaf*, petitioners' hodge-podge of statistics, songs, poems, and the like, falls far short of converting the subject of voluntary enlistment in the military service into a controversial issue of public importance within the meaning of the fairness doctrine.[9] A subject is not elevated to being a controversial issue of

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[8] Petitioners have not sought to show that WRC-TV has not devoted time to the expression of viewpoints opposed to the draft.

[9] Petitioners argue that enlistment affects a large number of persons, that the cost of administering the Selective Service System and the value of recruiting announcements is large in numbers of dollars, that enlistment in the military can be dangerous (petitioners argue that "it is anomalous to say that smoking is more dangerous than bearing arms"), that there is significant public action as evidenced by laws providing for alternatives to military service and lastly, that the interest of the audience is demonstrated by movies, songs and poems discussing the legality of armed conflict and the trauma of participating in wars.

public importance by reason of the criteria articulated by petitioners. Indeed, if petitioners' criteria were to prevail, scores of subjects would be transformed into controversial issues of public importance. For example, restricting ourselves to recruiting announcements alone, we suggest that announcements which recruit for the Peace Corps, Vista, or the police or fire departments would raise controversial issues of public importance under petitioners' criteria, especially since some of these organizations also present a significant expectancy of danger of injury or death. And while each of the occupations may touch on a broader issue which may be controversial and which must be treated fairly in overall programming—for example, Peace Corps might relate to the question of foreign aid, Vista to the crisis of our cities and unemployment, police recruiting to varying approaches to effective crime control—the recruiting announcements themselves are no more than peripherally related to these broader questions and do not themselves present a viewpoint on controversial issues of public importance.

Similarly, in the instant case, it is not the existence of regular military service which is a controversial issue of public importance, but matters related to such military service such as the draft and the deployment of troops to Vietnam. These issues are being covered by the licensee in its programming.

Given the conflicts, tensions and disorders throughout the world today—the Middle East crisis, the Sino-Soviet border disputes, the development by China of nuclear weapons, to name only a few—hardly anyone would seriously contend that the United States should unilaterally disarm itself and demobilize all its armed forces, a result which would inevitably follow from a discontinuance of compulsory and voluntary recruitment.

Petitioners have not argued that the armed services

recruitment messages to encourage voluntary enlistment are not in the public interest[10]—at best, they set forth the basis for a claim of a different public interest. Indeed, although neither the licensee nor the Commission raised the issue, it might be contended that any large-scale attempts to *discourage* military service might be contrary to the public interest. See *United States* v. *Schwimmer*, 279 U.S. 644, 645 (1929):[11]

> "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government."

It is difficult even to conceive at this time in our country's existence that any substantial issue could seriously be raised that the maintenance by the United States of Armed Forces is not in the public interest. Concomitantly, service by in-

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[10] It was the public interest criteria which was the foundation of this Court's decision in the *Banzhaf* case. The Commission had found that in light of the overwhelming evidence on the dangers of smoking to one's health, a licensee could not operate in the public interest, as it was bound by statute to do, if it encouraged its listeners to smoke. This Court found that in view of the body of data on the hazards of smoking, together with the fact that smoking was physically addicting and therefore confirmed smokers were likely to be unreceptive to information about its dangers, the Commission could reasonably determine that a spot announcement approach was required. Indeed, in light of these facts, the Commission stated that but for the enactment by Congress of the Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331–39, it would have banned cigarette advertising from the air. Based on the foregoing, this Court found that whatever else "public interest" might mean, it certainly included the public health and the public interest standard thereby justified the very extreme action in *Banzhaf*.

[11] Although *Schwimmer's* specific ruling that an alien pacifist must be denied citizenship if he refuses to take an oath to bear arms in defense of his country has been overruled (*Girouard* v. *United States*, 328 U.S. 61, 69 (1946)), the language cited is still valid.

dividuals in the armed forces is essential to the maintenance of such armed forces. Clearly, the conclusion of a licensee, as stated by WRC-TV in its response to petitioners that "there is no substantial public controversy about the need for or desirability of United States armed forces at this time, or the voluntary recruitment of people to serve in the armed forces" (App. 14) was not so unreasonable that the Commission should have overruled the licensee.

D. Station WRC-TV Did Offer Petitioners an Opportunity to Present Their Views in the Context of Substantive Programming.

Even though Station WRC-TV had properly concluded that petitioners were not entitled to have their views on the draft broadcast, the station did offer petitioners the opportunity to appear on one of its programs and to develop a series of programs to be broadcast by the station. This was a separate and independent basis on which petitioners' request for the broadcast of their announcement was denied by Station WRC-TV. The station recognized that the question of the draft was a controversial issue of public importance and it decided that program time and not announcements was the best vehicle for the presentation of views on the subject, including the presentation of petitioners' views. This action was completely reasonable and proper since it is the licensee who must determine the format of the programs to be devoted to a particular subject. *See Report on Editorializing, supra; Fairness Primer, supra.*

E. The Commission Did Not Improperly Characterize Petitioners' Claim.

Petitioners argue that the Commission "decided the wrong issue" (Pet. Br. p. 17) and did not respond to petitioners' argument that only one side had been presented

on the issue which petitioners contended was raised.[12] Petitioners contend that opposite conclusions were reached in this case and in *Alan F. Neckritz*, 24 F.C.C. 2d 175, 19 P & F Radio Reg. 2d 497 (1970) and *San Francisco Women for Peace*, 24 F.C.C. 2d 156, 19 P & F Radio Reg. 2d 501 (1970), cases decided by the Commission on the same day as the instant case.

An analysis of the three decisions reveals, however, that in upholding the licensee's refusal herein, the Commission did not contradict its decisions in the *Neckritz* and *San Francisco Women* cases, which are fully compatible with the decision herein.

In each case, the Commission (i) analyzed the complainant's and the station's contentions as to what issue or issues were raised by the announcements which were broadcast; (ii) stated whether it agreed with complainant that the announcements stated implicitly or explicity what it contended they stated, and (iii) made a finding on the rea-

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[12] Even in this Court, the alleged issue which petitioners contend was raised by the military recruitment announcements has been variously described by petitioners as:
—the desirability of bearing arms (Pet. Br. p. 17);
—the desirability of service in the military (Pet. Br. p. 18);
—the desirability of choosing to serve in the regular military (Pet. Br. p. 13);
—the desirability of military service (Pet. Br. p. 5, 6, 8);
—the desirability of regular military service (Pet. Br. p. 11, 16, 23, 24);
—the desirability of regular service in the military (Pet. Br. p. 13);
—an admonition to serve one's country honorably by bearing arms (Pet. Br. p. 16, 22); and
—a claim that a career in the armed forces is desirable, rewarding, and the best way to serve one's country (Pet. Br. p. 5)
Petitioners' multi-faceted characterization of the alleged issue takes on significance in light of petitioners' claim that the Commission "muddied its analysis" merely because it alternatively referred to the issue as "military service" and "regular military service." (Pet. Br. p. 14, n.) In this connection, it is interesting to note that petitioners' own Brief herein refers to "military service" in at least three instances, "regular military service" in three instances, and in one instance refers to "service in the regular military."

sonableness of the station's conclusion as to whether such announcements constituted the presentation of a view on a controversial issue of public importance.

Thus, in the instant case, the Commission correctly analyzed petitioners' contention that the announcements portrayed military service as an honorable way to serve one's country. The Commission, in essence, agreed that this conclusion might reasonably be drawn from the recruiting announcements but declined to accept the further contention that the announcements portrayed military service as the *only* way to serve one's country honorably. (App. 34 n.) It decided that the licensees were not acting arbitrarily in concluding that the desirability of voluntary military service was not a controversial issue within the fairness doctrine.

The Commission noted further that the announcement which petitioners desired to broadcast clearly discussed the draft and its alternatives and that these matters constitute a controversial issue of public importance. But it noted that the licensees were already covering both sides of this draft issue in their programming.

In *Neckritz,* the Commission analyzed complainant's contention that recruiting messages raised a controversial issue of public importance (i) because of the controversy surrounding U.S. involvement in Vietnam, and (ii) because enlistment was presented as an alternative to the draft. The licensee had determined that the announcements discussed only voluntary enlistment and did not raise the issue of Vietnam or the draft. The Commission upheld the judgment of the licensee and ruled that the broadcasting of the recruiting announcements did not give rise to any fairness doctrine violation.

Similarly, in *San Francisco Women,* it was contended that armed forces recruitment could not be considered without reference to the war in Vietnam; that a military recruit is likely to be stationed in Vietnam during his tenure; and

thus, there are many who believe that the best course of action is to seek a deferment. The Commission again concluded that the subject broadcasts did not raise the issues complainant ascribed to them.

> "The fact that Viet Nam and the draft are controversial issues of public importance does not in our view automatically require that recruitment messages also be considered as such . . ." (App. 19)

Thus, in each of the three cases, the Commission held that the recruiting announcements did not give rise to fairness violations since they did not present one side of a controversial issue of public importance, and, in particular, did not discuss:

(i) the draft, as contended in *Neckritz* and the instant case;
(ii) the Vietnam war, as contended in *San Francisco Women;* or
(iii) the military as the *only* honorable way to serve one's country, as contended in the instant case.

The Commission's discussion of the draft and its alternatives in the instant case clearly arose not with respect to the voluntary recruitment announcements which were in fact broadcast (and which the Commission expressly found did not discuss any controversial issue of public importance) but rather with respect to the announcement petitioners wished the stations to broadcast. Neither *San Francisco Women* nor *Neckritz* involved similar proposed announcements and the Commission's opinions in those two cases related solely to the question of whether enlistment announcements discussed controversial issues.

In sum, neither the Commission nor any of the licensees mischaracterized the issue raised by the recruiting announcements as discussing the desirability of the draft; indeed, the Commission rejected this suggestion in the *Neckritz* and *San Francisco Women* cases. And the licensees

were reasonable in characterizing petitioners' proposed announcement as discussing the draft.[18]

II.

THERE ARE NO DEFICIENCIES IN THE STANDARDS FOR JUDGING FAIRNESS COMPLAINTS AND NO DEFICIENCIES IN THE PROCEEDINGS HEREIN

A. The Commission's Standards for Judging Fairness Complaints Are Adequate And Reasonable In Light of the Express Congressional Prohibition of Censorship.

In a feeble attempt to raise an appellate issue, petitioners argue that the licensee is without any guidelines to judge whether any particular broadcast matter raises or discusses an issue of public importance and that, absent any such standards, the Commission's deference to the licensee's judgment is improper. Petitioners' argument is wholly without merit.

The fairness doctrine contemplates a two step procedure whereby (1) the licensee is expected to "make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved . . ." and (2) the Commission, in passing on any complaint in the area is not to substitute its judgment for that of the licensee "but rather to determine whether the licensee can be said to have acted reasonably and in good faith." (*Fairness Primer, supra* at 1904).

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[18] The replies of each of the stations to petitioners' initial request make this clear. WTOP-TV replied to petitioners that the *spot copy which they had submitted* expressed "a viewpoint on a controversial issue." (App. 11). Petitioners inaccurately and incorrectly state that WTOP-TV acknowledged in its reply that recruitment announcements raised a controversial issue (Cf. Pet. Br. p. 7). WMAL-TV referred to petitioners' request "to broadcast spot announcements containing anti-draft messages." (App. 12) WRC-TV refused to broadcast the "suggested spot announcement you offered to us which is opposed to the draft." (App. 14).

This obligation imposed upon the licensee is further explained by the Commission in its 1949 *Report on Editorializing, supra,* where the Commission makes clear that "the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics" and that the licensee is expected to "play a conscious and positive role in bringing about balanced presentation of the opposing viewpoints" (25 P & F Radio Reg. at 1907).

As an aid and guide to the licensee's judgment in this area, the *Report* notes that:

> "The life of each community involves a multitude of interests some dominant and all pervasive such as interests in public affairs, education and similar matters and some highly specialized and limited to few. The practical day-to-day problem with which every licensee is faced is one of striking a balance between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of the many" (25 P & F Radio Reg. at 1903).

At the same time, however, the *Report* recognizes that the licensee will be called upon to exercise his best judgment and good sense to determine what subjects should be considered, program format, spokesmen and the like and the Commission restates that the Commission's role is limited to determining whether the licensee acted reasonably and in good faith (25 P & F Radio Reg. at 1910, 1911). This regulatory scheme, with the *Report on Editorializing* being the cornerstone of the Commission's decisions in the fairness area, was specifically upheld against a challenge of lack of specificity by this Court in the *Red Lion* case where it was stated that:

> "The court is dealing now with a set of reasonably concise and specifically enumerated prohibitions addressed to the evils they seek to guard against. *See*

> *Report on Editorializing, supra,* 47 U.S.C. § 315 (1962), and the *Fairness Primer, supra.*" (*Red Lion Broadcasting Co.* v. *FCC,* 127 U.S. App. D.C. 129, 381 F.2d 908, 921 (D.C. Cir. 1967)).

In short, the Commission has refrained from delineating any "all embracing formula" for the discussion of public issues of interest in the community served by each station (25 P & F Radio Reg. at 1907) or "particular format" (25 P & F Radio Reg. at 1913) which must be followed. The reason for this conscious lack of particularity is obvious. Nothing in the Communications Act authorizes the Commission to involve itself in programming or programming content and, indeed, Section 326 of the Act expressly prohibits Commission censorship.

As Professor Chafee has noted, one of the things which is clearly included within the concept of "censorship" is "dictation as to what should go into particular programs." Z. Chafee, Government and Mass Communications at 396 (1965).

Indeed, the Commission has itself recognized that Section 326 precludes it from prescribing program content. Thus, in *Washington Women's Strike for Peace,* 6 P & F Radio Reg. 2d 307 (FCC 1965) the Commission, after quoting Section 326 said:

> "Thus, the Act makes it clear that the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air. Moreover, Section 3(h) of the Act provides that '. . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' " (6 P & F Radio Reg. 2d at 308).
>
> *See also Paul M. Butler,* 19 P & F Radio Reg. 991, 992 (FCC 1960).

As this Court noted in *Banzhaf* v. *FCC, supra,* the Commission, in applying the public interest standard to the

delicate area of the licensee's programming judgment, "walks a tightrope between saying too much and saying too little." It has resolved this dilemma by imposing only general affirmative duties—e.g., "to strike a balance between the various interests of the community." (405 F.2d at 1095).[14]

B. There Were No Procedural Defects in the Proceedings Before the Commission.

Petitioners contend that NBC's response to an inquiry by the Commission, informing the Commission that WRC-TV had offered petitioners opportunities to appear on the station and present their views and those of their organization, was an improper ex-parte communication and "is not properly before the Court" (Pet. Br. p. 6-7 n., 47). This contention is incorrect.

First petitioners never afforded the Commission an opportunity to pass on this issue. Petitioners claim that they were not aware of any communication between NBC and the Commission until they examined the record on appeal in this case. (Pet. Br. p. 7, n.). The Commission's decision, however, expressly refers to the WRC-TV offer of free air time.[15]

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[14] The Commission's requirement that a licensee ascertain and report to it on the needs and problems of the community served by the licensee affords both the licensee and the Commission help in determining the extent of community concern for specific issues. See, e.g., *Primer on Ascertainment of Community Problems by Broadcast Applicants*, FCC Docket No. 18774, 34 Fed. Reg. 20282, 2 P & F Radio Reg., Current Service, 53:273(1969).

[15] The Commission stated "We have been informally advised that the station [WRC-TV] has offered the Society of Friends time to appear on two religious program series on which they would have an opportunity to present their views." (App. 34). Further the Commission stated that ". . . both stations [WMAL-TV and WRC-TV] although they declined to broadcast the views urged by Professor Green and his group in the form of promotional spot announcements have offered the opportunity for the presentation of such views in the context of substantive programming." (App. 35).

If petitioners felt this offer was improperly considered or necessitated some response, their remedy was to seek reconsideration by the Commission. See 47 U.S.C. § 405, which provides in pertinent part:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission or designated authority within the Commission, has been afforded no opportunity to pass."

Having failed to raise this matter before the Commission, petitioners cannot now raise it on review.[16] *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir. 1968); *O'Neill Broadcasting Co.* v. *United States*, 100 U.S. App. D.C. 38, 241 F.2d 443 (D.C. Cir. 1956).

In any event, the challenged communication was not in violation of Commission procedure. The Commission's Rules expressly provide for the Commission's securing the licensee's comments on a fairness complaint as well as a statement of programs which he has presented or which he plans to present with respect to the issue in question. *See Fairness Primer, supra* at 1905. *See also, Letter to Oren Harris, supra* at 166. Nothing in the Act or in the Commission's rules requires the licensee to serve upon third parties copies of the information furnished in response to such a Commission request. *Cf. Television Broadcasters, Inc.*, 5 P & F Radio Reg. 2d 155 (FCC 1965).

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[16] Petitioners, of course, did not seek reconsideration. One can only speculate why. It might have been that petitioners knew the facts stated by WRC-TV to be true and preferred not to contest it before the Commission, or perhaps, as the record herein indicates, because on the same day NBC's attorney was responding to a Commission staff inquiry, petitioners were also engaging in similar communications with the Commission staff. See letter from Albert Kramer, petitioners' attorney, to FCC Assistant General Counsel Robert Greenburg (App. 16).

Petitioners' reference to § 1.1241 (47 CFR § 1.1241) of the Commission's Rules in support of the argument that the Commission staff engaged in prohibited "ex parte" communications with WRC-TV is inappropriate. This section, and the entire Subpart H of which the referenced section is only a part, relate solely to adjudicative proceedings, from the time they are designated for hearing, and to restricted rulemaking proceedings, neither of which categories include the fairness doctrine complaint procedure.

So also, the provision of the Administrative Procedure Act cited by petitioners (5 U.S.C. § 554) is inapposite. This provision relates to procedures to be followed for hearings and applies only in the case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing.

The subject fairness complaint fits in neither of these categories since the petitioner was not entitled to and did not receive a "hearing" [17] as defined therein, and thus the cited references are irrelevant.

Therefore, the response of NBC and the information submitted therein which reflects WRC-TV's offer to petitioners of an opportunity to appear on the station and discuss their beliefs were properly before the Commission, were duly

[17] Petitioners ascribe error to the Commission in that they were denied such a hearing (Pet. Br. p. 1) even though (i) they never requested a hearing before the Commission and (ii) neither the Commission's rules nor the Communications Act require the Commission to hold a hearing on a fairness doctrine complaint. Indeed, even where a fairness complaint is made at the time of license renewal (when the Commission has statutory authority to hold a hearing), there is no requirement that a hearing be held. See *Hale* v. *FCC*, —— U.S. App. D.C. ——, 425 F. 2d 556 (D.C. Cir. 1970). It should also be noted that during fiscal year 1969, the Commission received some 2,000 complaints of alleged violation of 47 U.S.C. § 315 and the fairness doctrine. (35th Annual Report, Fiscal Year 1969, Federal Communications Commission). Clearly any requirement that hearings be held on all fairness complaints would overtax the Commission's resources to the point of collapse.

placed in the Commission record (See App. 1) and are properly before the Court.

Moreover, the Commission's decision was based on the irrelevance of the proffered anti-draft announcement to the voluntary recruitment message and the fact that the overall fairness of the station's coverage of the draft issue had not been controverted. These crucial determinations could not conceivably be refuted by any more extensive proceedings herein. *See Banzhaf* v. *FCC, supra.*

III.

ACCESS TO BROADCASTING FACILITIES IS NOT GUARANTEED BY THE CONSTITUTION AND IT WAS NOT IMPROPER TO REFUSE PETITIONERS' REQUEST FOR TIME ON THE AIR

Petitioners make three arguments in support of their claim that constitutionally guaranteed rights have been usurped by the Commission's action herein.

First, petitioners contend that the lack of close supervision by the Commission of broadcasters creates a prior restraint on speech in violation of the First Amendment. Petitioners would require that a broadcaster, in every case where he refuses to broadcast what any member of the public offers him, make "an affirmative showing", to the Commission presumably, "that the speech is not related to a matter of public importance with respect to which he has already presented a point of view" before refusing to allow anyone to broadcast his views. (Pet. Br. p. 29).

Second, petitioners contend that the refusal of the broadcaster to allow petitioners (and presumably all others) to broadcast their views violated their First Amendment right to "a forum." (Pet. Br. p. 44).

Finally, it is urged that the Commission procedure where-

by fairness complaints against a licensee are judged by a standard of reasonableness rather than pursuant to any absolute standard of fairness amounts to a denial of due process of law. (Pet. Br. p. 34).

Each of petitioners' arguments misconstrues the nature of the Constitutional rights at stake. That the protection afforded by the First Amendment extends to broadcasting was made clear in *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948). Recent decisions [18] discussing the nature of the First Amendment standards to be applied to broadcasting have not altered this fundamental principle.

A. The First Amendment Does Not Guarantee Petitioners Access to the Airwaves.

We begin with the observation that the First Amendment prohibits governmental interference with the rights of free speech and a free press. In *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960), the Supreme Court stated that freedom of speech and a free press "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." 361 U.S. at 523. *See also Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952); *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938); and *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

The particular cases concerning prior restraints on speech and the press cited by petitioners on page 36 of their Brief are inapposite to the case now before the Court since here no direct interference by the government with First Amendment rights is involved. Each case cited by petitioners involved a statute directly affecting the exercise of First Amendment rights by prohibiting, or authorizing

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[18] *Banzhaf* v. *FCC, supra; Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); and *Retail Store Employees Union, Local 880* v. *FCC,* No. 22,605 (D.C. Cir., Oct. 27, 1970).

the injunction of, protected conduct.[19] No such statute is involved in the case now before the Court.

The question which arises when First Amendment rights are at stake is how much Government intervention is permissible, not how little. As the Court stated in *Near* v. *Minnesota*, 283 U.S. 697 (1931):

> "The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and be required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship." (283 U.S. at 721)

Petitioners contend that *more* government regulation of

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[19] *Mills* v. *Alabama*, 384 U.S. 214 (1966), involved a state law making it a crime to write and publish editorials on election day urging voters to cast their ballots in a certain way; *Near* v. *Minnesota*, 283 U.S. 697 (1931), a state statute which provided for enjoining as a nuisance the publication and distribution of newspapers, magazines or other periodicals, issues of which were found to be malicious or defamatory; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), a city ordinance making it an offense to participate in a parade without first obtaining a permit; *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968) and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), censorship procedures created by municipal ordinance and state law, respectively; and *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), a state procedure for enjoining the sale and distribution of obscene printed matter.

broadcasting is necessary, stating in effect that the broadcaster must obtain the permission of the Commission—a government agency—every time he decides not to broadcast a particular program offered to him or to allow a particular group or individual to use his facilities. Under such a system the Commission would in fact be dictating what programs and views would be broadcast. Not only would the Commission inevitably determine whether an individual or group could broadcast its views, but, given the fact that only a limited number of programs can be broadcast by any one station on any day, the Commission would have to decide which of the available programs should be broadcast. Such a system would fly in the face of the explicit Congressional direction against regulation of program content as set forth in the Communications Act, 47 U.S.C. §326.[20]

The concept of free speech and a free press necessarily carries with it the existence of discretion on the part of the publisher or broadcaster with respect to the content of the publication or broadcast. The compulsion of particular expression is as much a violation of the First Amendment as is the suppression of particular views. As the Supreme Court stated in *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624 (1943):

> "... Compulsory unification of opinion achieves only the unanimity of the graveyard. . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens

[20] Section 326 of the Communications Act provides:
"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

> to confess by word or act their faith therein." (319 U.S. at 641-642)

As this Court stated in *Banzhaf* v. *FCC, supra:*

> "We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition." (405 F.2d at 1103).

The final answer to petitioners' demand for increased government supervision of broadcasting is that the system of regulation established by the Communications Act of 1934 has been challenged on the ground that it violates the First Amendment, and the system and Act have been upheld. *See O'Hair* v. *United States,* 281 F. Supp. 815 (D.D.C. 1968); *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). As the Supreme Court stated in the *National Broadcasting* case:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The right of free speech does not include . . . the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity'. Denial of a station license on that ground, if valid under the Act, is not a denial of free speech." (319 U.S. at 226, 227)

Thus, in the field of broadcasting, the nature of the medium makes some government regulation necessary. However, this is not to say that the limited regulatory system must impose a pervasive censorship in contravention of the requirements of the First Amendment and of the Communications Act of 1934 itself.

Petitioners cite *Banzhaf* v. *FCC, supra*, as precedent for their contention that they are constitutionally guaranteed free air time to discuss their views.[21] But, in *Banzhaf*, this Court expressed its awareness of the "dangers of censorship or pervasive supervision" arising from the consideration of program content by the Commission and recognized as well that there must not be an "impermissibly broad intrusion upon a licensee's individual responsibility for programming." (405 F.2d at 1096). Moreover, the Court made it clear that its upholding of the cigarette ruling of the Commission "neither forbids nor requires the publication of any specific material." (405 F.2d at 1096).

> "The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.
>
> The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of the particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'" (405 F.2d at 1099) (footnote omitted).

Nor did the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), provide any material support for petitioners' contention. The Supreme Court in the *Red Lion* case upheld the validity of the fairness doctrine (1) as applied by the Commission in a particular case to require a broadcaster to provide reply time for an indi-

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[21] Petitioners would for all practical purposes make broadcast licensees "common carriers" despite the express language of the Communications Act which states that ". . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." (47 U.S.C. § 153 (h)). *See, Mass. Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945)

vidual who had been personally attacked during a broadcast on the broadcaster's radio station and (2) as codified by the Commission in regulations concerning personal attack and political editorials which required a broadcaster to provide reply time to individuals or groups which are personally attacked during a presentation of views on a controversial issue of public importance on a station of the broadcaster and to candidates not endorsed, or opposed, by the broadcaster in editorials. There is no question of a personal attack directed against petitioners in the case before the Court, nor are petitioners candidates for, or spokesmen of a candidate for, public office.

The opinion of the Supreme Court in *Red Lion* carefully restricted the impact of the decision to the particular cases and regulations then before the Court. At the same time, however, the Court made clear its awareness of the constitutional and statutory limitations upon the authority of the Commission. The Commission's rules and regulations must "fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by §326 of the Act." (395 U.S. at 382). Moreover, the Court ruled that the Commission must not be "left with a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech." (395 U.S. at 395).

Specific regulations, like those concerning personal attack and political editorializing upheld in *Red Lion*, prevent the development of "*unlimited* private censorship operating in a medium not open to all." (395 U.S. at 392) (emphasis added). Day-by-day supervision by the Commission, however, would entail government censorship. The real control of the Commission over broadcasters lies in the licensing power of the Commission, which was recognized by the Supreme Court in *Red Lion*.

In summary, petitioners' First Amendment argument raises nothing new. This Court has already clearly deter-

mined that the Commission's CATV non-duplication rules as well as its licensing rules do not amount to prior restraint of speech in violation of the First Amendment. In *Buckeye Cablevision, Inc.* v. *FCC,* 128 U.S. App. D.C. 262, 387 F.2d 220 (D.C. Cir. 1967) it was held that the restraint imposed by the non-duplication rules is no more than "is reasonably required to effectuate the public interest requirement of the Act." (387 F.2nd at 225).

So also, in *Carter Mountain Transmission Corp.* v. *FCC,* 116 U.S. App. D.C. 93, 321 F.2d 359 (D.C. Cir. 1963) where denial of a license to a microwave carrier seeking to serve a CATV system was labeled a prior restraint, this Court said:

> "It may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulations is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech. See *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226-227, 63 S. Ct. 997, 87 L. Ed. 1344 (1943)." (321 F. 2d at 364)

Similarly, the denial of an opportunity to broadcast the proffered spot message is not a denial of any constitutionally guaranteed right to speech. The broadcaster determined that petitioners are not entitled to air time for this purpose, and the Commission found that decision was not unreasonable. Absent a clear abuse of discretion by each of these two parties, their decision should stand. To hold otherwise would endanger free speech and freedom of the press in broadcasting by creating an official government view to dominate public broadcasting. *Red Lion, supra,* at 396.

B. Petitioners' Fifth Amendment Rights Are Not Violated.

Petitioners also argue that the right to due process of law guaranteed them under the Fifth Amendment is violated by the Commission's alleged deference to the judgment of the licensee in determining whether a particular issue requires the balanced coverage envisioned by the fairness doctrine. Thus, petitioners argue that the licensee is permitted to operate without any guidelines other than the standard of "good faith" and without any other accountability. That any other standard would amount to Government censorship has already been discussed (*supra*, page 28). Further, licensees are fully accountable for their actions on fairness questions. Fairness doctrine violations are considered by the Commission when presented by specific complaints and the question of whether a licensee generally is operating in the public interest on an overall basis including fairness aspects of his operation is further determined each time the license is renewed. *See Letter to Oren Harris, supra. See also Retail Store Employees Union, Local 880* v. *FCC*, No. 22,605 (D.C. Cir., Oct. 27, 1970).

As stated in the Commission's *Report on Editorializing*, in all such cases:

> "... The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question ... the Commission in the exercise of its functions may be called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues. But the standard of reasonableness and the reasonable approximation of a statutory norm is not an arbitrary standard incapable of administrative or judicial determination, but, on the contrary, one of the basic standards of conduct in

> numerous fields of Anglo-American law. Like all other flexible standards of conduct, it is subject to abuse and arbitrary interpretation and application by the duly authorized reviewing authorities. But the possibility that a legitimate standard of legal conduct might be abused or arbitrarily applied by capricious governmental authority is not and cannot be a reason for abandoning the standard itself. And broadcast licensees are protected against any conceivable abuse of power by the Commission in the exercising of its licensing authority by the procedural safeguards of the Communications Act and the Administrative Procedure Act, and by the right of appeal to the courts from final action claimed to be arbitrary or capricious." (25 P & F Radio Reg. at 1911).

Likewise, members of the listening public are protected against any conceivable abuse of power by either the licensee or the Commission if, on appeal, they can show the action taken by the Commission to have been arbitrary or capricious. Such a showing has not been made in this case.

CONCLUSION

It is well established that the function of the Court in reviewing an agency's determination is supervisory in nature and is limited to assuring that the agency has not acted in contravention of its statutory authority and that the decision of the agency has not produced an arbitrary or unreasonable result. *Greater Boston Television Corp.* v. *FCC*, No. 17,785 (D.C. Cir., Nov. 13, 1970). The role of the court is to determine whether there was a rational basis for the agency action.[22]

As stated in *Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969), quoting from *Radio Corp. of America* v. *United States*, 341 U.S. 412 (1951), "courts should not overrule an administrative decision merely because they disagree with its wisdom, but only if they find it to be arbitrary or against the public interest as a matter of law." (409 F.2d at 326). Moreover, the discretion of an agency is particularly broad when it sets enforcement policy and the "burden of establishing a claim of illegality is a heavy one." *Greater Boston Television Corp.* v. *FCC*, *supra*.

The facts herein evidence that the Commission properly found that the action taken by Station WRC-TV was reasonable and in accordance with established precedents for the handling of fairness complaints. The Commission's decision that petitioners' fairness doctrine complaint was without merit could be upheld on several equally valid and independent alternative grounds, *i.e.*, that petitioners sought time to deal with the draft, an issue not raised by the voluntary recruiting announcement, and as to which

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[22] Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 states that the standard is whether the action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Courts have consistently held that the essence of the concept is "rationality." *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), *Paducah Newspapers, Inc.* v. *FCC*, 134 U.S. App. D.C. 287, 414 F.2d 1183 (D.C. Cir. 1969).

issue the licensee had presented contrasting views in its programming, and that the voluntary recruiting announcements did not raise a controversial issue of substantial public importance.

For all of the foregoing reasons, the decision of the Federal Communications Commission should be affirmed.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.24,470

David Green, Individually and as
Chairman of the Peace Committee,
Petitioners,

v.

Federal Communications Commission
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Petition for Review of Order of
the Federal Communications Commission

REPLY BRIEF FOR PETITIONERS

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February 8, 1971

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REPLY BRIFF FOR PETITIONERS

Introduction - The Issues Raised by the Responding Briefs

Respondent F.C.C.[1/] has submitted a 24-page brief (hereafter F.C.C. Br.) and Intervenor National Broadcasting

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1/ Since the United States is only a nominal respondent in this proceeding, petitioners will refer only to the Commission as the respondent.

Company, Inc. (hereafter NBC) has submitted a 36-page brief (hereafter NBC Br.). Aside from a number of errors with respect to the holding of particular cases and with respect to petitioners' contentions, the briefs advance no substantive arguments not already disposed of by petitioners' brief (hereafter Pet. Br.) and fail to respond to several of petitioners' arguments. The responding briefs argue:

--- that the military recruitment ads in question do not present one point of view on a controversial issue of public importance;

--- that petitioners' proffered ad presented a point of view on a controversial issue of public importance, i.e., the draft, to which the licensees had already devoted a significant amount of time; and

--- that "good faith and reasonable judgment" is an adequate standard under the public interest standard and the First and Fifth Amendments to the Constitution to guide licensees in each of the determinations they must take in administering the fairness doctrine.[1/]

Both respondent and intervenor, however, raise procedural arguments as to whether the issues raised by petitioners are properly before this Court. The F.C.C. argues that petitioners gave the Commission no opportunity to pass on several of petitioners' legal arguments and did not present the F.C.C. with some

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1/ The F.C.C. responds to none of petitioners' constitutional arguments. See text following this note.

of the "evidence" it now offers in its (petitioners') brief. F.C.C. Br. at 11-13. The Commission implies that petitioners should have filed a petition for reconsideration to allow the Commission to first pass on this material. Id. at 12. Accordingly, the F.C.C. purports to address itself only to the issue of whether the broadcast of military recruitment ads required the stations to carry the spot announcement proffered by petitioners. Id. at 13.

NBC joins the Commission in arguing that petitioners should have sought a reconsideration by the Commission. But it does so in the context of attempting to refute petitioners' claim, Pet. Br. at 6-7, n., 45, that NBC's "informal" submission of evidence without petitioners' knowledge may have deprived petitioners of a fair opportunity to be heard. NBC Br. at 22-23.

I. Military Recruitment Ads Present One Point of View on the Controversial Issue of the Desirability of Regular Military Service and the Opposing Point of View Must Be Presented

Petitioners asserted as the basis of their original complaint, J.A. at 9, that by repeatedly and unequivocally touting a host of beneficial reasons for enlisting for regular military service while totally excluding any mention of the undesirable aspects of such service, the military recruitment ads present one side of a controversial issue of public importance--the desirability of regular military service.[1/]

1/ NBC seizes on petitioners' use of several phrases to describe the controversial issue raised by the ads to argue that petitioners' position is unclear. NBC Br. at 16, n.12. Petitioners set forth a definition of regular military service in their brief. Pet. Br. at 4, n. . All the phrases cited by NBC are variations of the phrase the desirability of regular military service or paraphrases of it, e.g., "honorably [serving one's country] by bearing arms",

(continued)

A. The "Net Impression" Intended and Conveyed by Military Recruitment Ads Is Unmistakably the Desirability of Regular Military Service

Both NBC and the Commission argue that the ads in question do not raise the issue of the desirability of regular military service. Making no attempt to analyze the ads, they characterize the issues presented as the desirability of "voluntary enlistment," e.g., F.C.C. Br. at 9, 18; NBC Br. 6, 10, 11, 12, 14; "military recruitment," or "whether the United States should maintain armed forces." E.g., F.C.C. Br. at 17, 18, 20; NBC Br. at 12-15. Neither the F.C.C. nor NBC offers any evidence as to the basis of these assertions. They state merely that these judgments are "reasonable" and in "good faith". E.g., F.C.C. Br. at 17: NBC Br. at 15. But whatever the meaning of the latter two phrases, a matter to which petitioners shall return, they are simply not relevant to assessing the message conveyed by the ads in question. The test to be applied under existing law is the "net impression" test, Charles of the Ritz v. F.T.C., 143 F.2d 676, 679 (2d Cir. 1944), Pet. Br. at 14-16, 24-25. The Commission's application of this test to determine that the message conveyed by cigarette advertising is the "affirmative presentation of smoking as a desirable habit" was affirmed by this Court. Banzhaf v. F.C.C., 132 App. D.C. 14, 405 F.2d 1082 (1968). The Commission found that the

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1/ (continued) which when taken in context are perfectly clear. Petitioners varied the phrases solely for the purpose of making the brief more readable. To satisfy the blandness that seems to have spilled over from NBC's broadcast fare into its legal literary style, petitioners will use only one phrase--the desirability of regular military service (as defined in Pet. Br. at 4,n.)--throughout this reply brief.

ads in question raised a controversial issue because

> ...the desirability [of smoking] is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk 14/

14/ The FTC report states ...that an estimated 58 per cent of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do. Cigarette Advertising, 9 F.C.C. 2d 921, 938 (emphasis supplied).1/

The standard to be applied, therefore, in evaluating what issue is raised by a particular advertisement is not what the licensee thinks the ad means or any other arbitrary guideline equally incapable of any objective measure. The standard is rather the impression the ads leave upon the mind of the average viewer. Pet. Br. at 14-16.2/ The military recruitment

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1/ This Court quoted with approval the Commission's conclusion that cigarette commercials

> "present the point of view that smoking is socially acceptable and desirable, manly and a necessary part of a rich, full life."
> 132 App. D.C. at 14, 405 F.2d at 1087.

2/ NBC's attempt to argue the inapplicability of Banzhaf and the cigarette ruling, NBC Br. at 14, n.10, to the presentation of opposing points of view of the ads here in question misstates petitioners' reliance on these precedents. Petitioners rely on them for the test to be applied to determine what issue is presented, i.e., the net impression test. Petitioners do not rely on Banzhaf to support the applicability of the fairness doctrine to the ads in question. The latter issue was resolved by the Commission when it said that these ads are subject to the fairness doctrine if they deal with a controversial issue of public importance. J.A. at 35, Retail Store Employees Union, Local 880, v. F.C.C., ___ App. D.C. __, F.2d ___, No.22,605 (October 27, 1970).

ads in question leave one unmistakable impression: regular military service is desirable, beneficial, educational and glamourous. Although the ads should be read in their entirety for the full flavor of the net impression they convey, an appraisal of the type contemplated by the net impression test is worthwile.[1/]

The ads offer a young man "travel . . . good pay . . . and most important . . . the opportunity to make a really worthwhile contribution to the security of" the United States, Spot Number One, a way to develop his special, unique talent . . . [his] hidden ability . . . [or] knack" through "job training techniques that rank among the finest in the world," Spot Number Two, and emerge as a "new man with muscles that respond instantly, . . . [possessing] self-confidence that will last the rest of . . . [his] life . . . ready to handle any situation . . . overcome any obstacle." Spot Number Three. Sergeant Joe Friday assures him that all of this is accomplished while he will "serve . . . [his] nation with pride," Spot Number Four, and develop "in body, mind and spirit." Spots Number Three, Five, and 11. Jonathan Winters adds that he'll "be proud of what . . .[he's] accomplished" as a "complete man." Spot Number Eight. If he is only a high school graduate, former Senator Paul Douglas offers some advice to the young listener: "[He] couldn't find a way to get off to a better start than with Marine training," Spot Number 10, while he "prove[s] himself" a man, see Spot Number 12, and no longer a boy. See Spots

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1/ The ads are reproduced in Appendix A of the F.C.C. Brief.

Number 13, 16, 18. But college graduates need not be discouraged, for "it takes more than just a college degree" to become "a man who can lead men." Spot Number 14. See Spot Number 15, 17. In short, the military will make a young man into "something else," not "just another guy." Spot Number 16.

It is a perversion of language and a contortion of logic to suggest that these ads leave the impression that they deal with "voluntary enlistment" or the rhetorical topic of whether the "United States should maintain an army." E.g., F.C.C. Br. at 9, 17, 18, 20; NBC Br. at 6, 10, 11, 12-15. As though it were a governmentally subsidized excursion through Alice's Wonderland, regular military service is presented by the ads not only as desirable, but as a beneficial undertaking for a young man. The interpretation placed on the ads by the Commission and NBC is analogous to claiming that the issue raised by cigarette commercials was the desirability of purchasing a cigarette or whether the United States should allow commerce in cigarettes.

One can hardly imagine a young man hearing these promotional ads and being impressed with the question of whether the United States should maintain an army. Rather, he would most likely begin musing about the desirability of regular military service, the benefits which could accrue to him, the excitement, fun, travel, money and generally favorable aspects of military life. The Commission's reasoning with respect to the net impression conveyed by cigarette advertising seems to aptly summarize the problem:

> "The cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose."
> Cigarette Advertising, 9 F.C.C. 2d 921,938 (1967).

B. The Desirability of Regular Military Service Is A Controversial Issue of Public Importance

Petitioners set forth a number of criteria for determining whether an issue is controversial. Pet. Br. at 17-22. Respondent F.C.C. does not attempt to refute these criteria, but instead asserts, again without support, that it was reasonable in upholding the licensees' judgment that no controversial issue of public importance was raised. F.C.C. Br. at 13-21. It offers no clue as to the guidelines it followed in arriving at this determination or when or how an issue becomes controversial. It asserts simply that it is constantly reexamining what issues are controversial without a hint as to the procedures it follows or criteria it applies in the course of this reexamination.

NBC states that

> "petitioners' hodge podge of statistics, poems, and the like, falls short of converting the subject of voluntary enlistment into a controversial issue of public importance . . . [Such a status is not achieved] by reason of the criteria articulated by petitioners."
> NBC Br. at 12-13.

But, assuming arguendo that NBC has correctly characterized the issue raised by the ads,[1/] NBC offers no criteria

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1/ As petitioners have noted, voluntary enlistment is not the issue here involved.

for determining when a topic has become a controversial issue of public importance. It asserts that the reasoning of Banzhaf with respect to the issue of whether the desirability of regular military service is one of controversial public importance is inapplicable to this proceeding. But it advances no supporting arguments. Instead it drags out a parade of horribles that flow from isolating one criterion or the other advanced by petitioners and argues that applying it alone would potentially open the floodgates to dozens of fairness claims. NBC Br. at 12-13. Petitioners need not pause to demonstrate the fallaciousness of NBC's hypotheticals. For here the issue involved--the desirability of regular military service--satisfies every reasonable criteria. There is no need to focus on the consequences of adopting any particular criterion.

In short, NBC and the Commission argue that a controversial issue of public importance is whatever a licensee says it is. That millions find regular military service repugnant to the ideals of freedom, believe that it inherently has a high potential for undeniably grave and undesirable consequences which may harm the individual in body, mind and spirit, and generally consider such service highly detrimental to society is irrelevant. Objective criteria are equally irrelevant. Only the licensee's judgment matters.

II. Petitioners' Proffered Ad Was Responsive to the Military Recruitment Ads. In Any Event, Licensees Cannot Avoid Responsibility for the Message Conveyed by Their Ads by Focusing on the Message Conveyed by Petitioners' Ad

As petitioners have repeatedly noted, their concern is with the desirability of regular military service. Both the Commission and NBC rely heavily on petitioners' proferred ad[1/] to argue that petitioners sought time to respond to pro-draft points of view. F.C.C. Br. at 9-10, 16, 22; NBC Br. at 9-11. It is therefore necessary to test the ad against the relevant legal standard, i.e., the net impression test.

A. The Net Impression Conveyed by Petitioners' Ad Is That Regular Military Service Is Undesirable

The ad, as noted, was prepared at the request of the licensees.[2/] It was not a part of petitioners' original claim to the stations. J.A. at 9.[3/] Both opposing parties rely on the presence of the word "draftee" in the announcement and the reference to "deferments" to say that the ad is anti-draft and therefore not opposed to the desirability of regular military service. But focusing on particular words used in the ad is not a test of the net impression.

1/ The text of the ad is set forth in the J.A. at 10.

2/ There is no dispute as to this point. But see note 3 , infra.

3/ NBC's reference, NRC Br. at 11, n.7, to petitioners' "belated attempt" to avoid the significance of the ad is totally unwarranted. As shall be noted below, petitioners are not attempting to avoid the ad.

When the net impression test is applied, petitioners' ad is not merely an anti-draft message. It cries out against the desirability of regular military service because of its attendant social consequences by focusing upon the potential horrors connected thereto. It is virtually inconceivable that a relatively susceptible yough leisurely viewing the ad would react by philosophically considering whether the draft should be abolished. Rather he is going to question the desirability of leaving behind Christina's counterpart to opt for regular military service. In this sense, the ad is anti-draft. But it is clearly directed to the more general problem of the desirability of regular military service[1/] and explicitly says so: "There are legal alternatives to military service". J.A. at 10. As petitioners have set forth at length, Pet. Br. at 11-13, the issue of whether it is desirable to engage in regular military service arises in a number of contexts, and the draft is only one of them.[2/]

1/ "It is of course true that hearing . . . viewpoints [opposing regular military service] will have some bearing on whether a man chooses to be drafted . . . [for regular military service] or to enlist . . .[for regular military service] or whether he seeks a 1-0 or 1-A-0 classification." But just as "this does not make the issue posed by an ad advocating . . . enlistment [for regular military service] into advocacy of the draft" Pet. Br. at 13, so it does not make an ad advocating the desirability of alternative service for draftees into an ad that is anti-draft.

2/ NBC's suggestion that a "vast campaign", NBC Br. at 12, of ads opposing the desirability of regular military service would violate the public interest is not in point. No "large scale attempts to discourage military service" NBC Br. at 14, is contemplated. The scale of the effort is limited by the scale of the government's use of the broadcast media in its recruitment efforts. Petitioners are dependent on the fairness doctrine to obtain time for contrasting viewpoints. (continued)

B. The Relevant Question Is Whether The Military Recruitment Ads Present a Point of View on a Controversial Issue of Public Importance

In any event, the issue before this Court is not whether petitioners' ad presents a point of view on a controversial issue of public importance.[1/] The question is whether the licensees have presented a point of view on a controversial issue of public importance. When they have done so, as

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1/ (continued)
More importantly, the quote from United States v. Schwimmer, 279 U.S. 644, 645 (1929) is totally inapposite.

> "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government." NBC Br. at 14 (emphasis added).

The matter at issue is whether it is desirable to fulfill such a "duty". Thus, the quote assumes the question to be resolved. It clearly does not contravene the public interest for a station to run ads providing information opposing the desirability of assuming such a "duty" when there are legal alternatives designed to relieve one of that "duty".

1/ Petitioner argued that the Commission had reached one conclusion in the instant proceeding with respect to the issue raised by the military recruitment ads and an opposite conclusion in Alan F. Neckritz, J.A. 37 with respect to the same ads. Pet. Br. at 10, 13-14. The Commission now argues that when in the instant proceeding it referred to the draft as "the controversial issue here involved," it was referring to the issue raised by petitioners' ad, not the military recruitment ads. F.C.C. Br. at 16, 22. NBC concurs and argues at length that the results in Alan F. Neckritz and the instant proceeding are consistent. NBC Br. at 15-19. Petitioners are not convinced. The language between the alleged two separate parts of the opinion--the first dealing with the issue raised by the military recruitment ads and the second part with the issue raised by petitioners' ad--is not disjunctive language, but rather conjunctive. For the Commission states "[i]n this connection . . ." J.A. at 34.

But in any event, the outcome of that debate does not affect this Court's disposition of this proceeding. On the one hand, petitioners have argued that the Commission and the stations applied the wrong standard in deciding what message is conveyed by petitioners' ad. On the other hand, if the decisions are consistent, then they were both decided incorrectly.

petitioners have shown they have in this case, they are obligated to present an opposing point of view. And they cannot, as the Commission seems to suggest they can, F.C.C. Br. at 2, evade this responsibility because they believed petitioners' ad was not responsive to the ads they presented. This is especially so where, in seeking to present that opposing point of view, petitioners did not insist that its ads be carried.[1/] Indeed, petitioners did not insist on announcements, as is clear from its acceptance of the WTOP offer.[2/] Rather, petitioners seek only a forum adequate to balance the views already presented by the licensees.[3/] It is inequitable for NBC and the Commission to rely on an ad prepared at the behest of the licensees to now bar petitioners from any forum adequate to the presentation of their point of view.

1/ Thus in its prayer for relief in this Court it asked that the licensee be ordered "to carry announcements opposing the desirability of regular military service," Pet. Br. at 47 (emphasis added), rather than that they be ordered to carry petitioners' announcements. And as noted in the text following this note, petitioners' major concern is with an adequate forum for effective presentation of their views.

2/ NBC's contention that petitioners have insisted on the spot announcement approach of Banzhaf, NBC Br. at 12, is simply not accurate. Petitioners' notice of the impact of spot announcements, Pet. Br. at 31-32, was made in the context of a discussion of the need for scrutiny of a procedure whereby complete discretion is delegated to the licensee at every step of the fairness doctrine's administration.

3/ Because petitioners were not insisting on the spot announcement approach, they were not obligated to accept offers of time that presented no opportunity for an effective presentation. Nor does the fact that Professor Green may have appeared--Professor Green has been out of the country and counsel has not been able to contact him with regard to the Commission's newly offered evidence--on WMAL's Outlook discharge its fairness obligations if that program was an inadequate forum, as petitioners have, contrary to the Commission's implication, F.C.C. Br. at 24, alleged.

III. Reasonable Judgment in Good Faith Is Not an Adequate Guideline for Protection of the Public Interest, for Safeguarding Freedom of Speech, or for Insuring that Due Process of Law Is Afforded Complainants

Both the Commission, e.g., F.C.C. Br. at 4, 11, 14, and NBC, e.g., NBC Br. at 7-9, 19-22, strenously argue that all that is required of a licensee is that it make reasonable judgments in good faith with respect to each of the three questions that must be resolved when a fairness doctrine complaint is filed. See Pet. Br. at 22-23. But these standards leave room for the exercises of untrammeled discretion and for discriminatory judgments that are repugnant to the Communications Act and the Constitution.

A. The Public Interest Standard of the Communications Act Requires Explicit Guidelines

Petitioners have discussed at langth the virtually unfettered descretion of a licensee in administering the fairness doctrine. Pet. Br. at 23-38. The Commission states that petitioners have not taken account of the requirement of reasonableness in characterizing the discretion accorded licensees to make judgments. F.C.C. Br. at 14, n.15. It relies on its own policy pronouncements and on the Supreme Court's upholding of the personal attack rules of the Commission in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). Although conceding that "broadcasters have wide discretion in complying with the fairness doctrine," NBC Br. at 8-9, NBC relies on Commission precedent, NBC Br. at 7-9, 19-21, to argue that the reasonable judgment standard is consistent with the public interest.

The Commission argues that reasonableness "is not an arbitrary standard incapable of administrative or judicial determination, but, on the contrary, one of the basic standards of conduct in numerous fields of Anglo-American law." F.C.C. Br. at 15, n.15. But "reasonableness" standing alone is a meaningless standard; it must be judged in terms of its relation to some other criteria. One cannot be reasonable unless one is reasonable with respect to some standard. Thus where reasonableness is employed, it is measured in relation to some other criteria. In tort law, for example, the reasonable man

> "presupposes some uniform standard of behavior. . . . The standard of conduct . . . must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor . . ."
> Prosser, Law of Torts 153 (3rd Ed. 1964) (footnotes omitted).

What is true of the law of torts is equally true of administrative law. See Greater Boston Television Corp. v. F.C.C., ___App. D.C.___, ___, ___ F.2d___, ___, No.17,785, Slip Op. at 16-20 (November 13, 1970). But here there is no standard against which the reasonableness of the licensee's judgment is measured by the Commission. Petitioners do not contend that there is no room for the exercise of discretion in the administration of the fairness doctrine. Pet. Br. at 32. But the "reasonableness" of the exercise of that discretion must be in terms of some standard. Banzhaf commands that the standard to be applied with respect to the message conveyed by an ad is the net impression test. And petitioners would agree, for example, that reasonable judgments as to the net impression of the military recruitment ads should not be disturbed. But

neither the Commission nor NBC purports to have applied any such standard. Indeed they argue there is no need for such a standard.

Likewise there is no standard against which the reasonableness of the judgment that an issue is of controversial public importance is measured. Petitioners have advanced criteria that relate directly to the degree of social preoccupation with an issue. Pet. Br. at 17-22. Both the Commission and NBC reject these criteria, preferring instead a "reasonable" judgment measured against standards known only to them.[1/]

Given the existence of a standard against which reasonableness can be measured, and assuming the legality of the standard adopted, it is true, as the Commission asserts, F.C.C. Br. at 13-14, that the role of a reviewing court is limited to assuring that the agency has not acted unreasonably. And similarly, given the existence of standards by which a licensee measures his conduct, it is true, as NBC asserts, NBC Br. at 20, that the Commission's role is limited to reviewing whether the licensee has acted reasonably. But there must first be compliance with the admonition that administrators, whether they be licensees or F.C.C. Commissioners, "articulate the factors on which they base their decisions." Environmental Defense Fund v. Ruckleshaus, ___ App. D.C.___, ___, ___F.2d___, ___, No. 23,813, Slip Op. at 22 (January 7, 1971), citing Greater Boston Television Corp., supra.

Thus in each of the cases cited by the Commission,

1/ The Commission asserts that petitioners do not suggest that the Commission has failed to provide a meaningful articulation of a standard of conduct by which the Commission measures compliance with the fairness doctrine. F.C.C. Br. at 15, n.15. Of course petitioners have challenged the standards by which the Commission measures compliance with the fairness doctrine. That is the subject of this petition for review.

F.C.C. Br. at 13-14, there was an extensive set of regulations and criteria that set forth with particularity the standards by which the agency would judge the regulatees' conduct and provided a test against which a court could measure the reasonableness of the agency's conduct. In Eugene J. McCarthy v. F.C.C., 129 App. D.C.56, 390 F.2d 471 (1968), the case most in point, this Court upheld the reasonableness of the Commission's refusal to grant equal time under its regulations implementing the equal time provisions of the Section 315 of the Communications Act, 47 U.S.C. §315. In so doing, the Court deferred to no unarticulated standard of nebulous meaning, but rather to a long standing regulation specifying with some particularity the standards applied by the Commission.[1/]

B. Particularity of Standards is Required to Safeguard First Amendment Rights. Particularity Does Not Contravene the Statutory Proscription of Censorship.

Despite the need for particularity to satisfy the public interest standard, NBC argues that more particularity of standards would prescribe program content in violation of Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits censorship or interference with the right of free speech by the Commission. It relies on this Court's language in Banzhaf. NBC Br. at 21-22. But taken as a whole Banzhaf supports, not under-

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1/ Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959) does not really appear to be in point. There the Supreme Court deferred to a long standing administrative interpretation despite the latter's lack of statutory basis because of the reliance placed on the agency's interpretation by broadcast licensees.

mines, the need for particularity. For the Court went on to note that

> "particularity is not in itself a vice; indeed, in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming."
> ____ App. D.C. at ____,405 F. 2d at 1096.

Particularity is thus a two edged sword. While it may limit the licensee's discretion, it also protects a licensee from an over-zealous regulator. So too, particularity serves to limit an otherwise over broad delegation of discretion to the licensee to bar the views of the public. As NBC itself noted,

> "Specific regulations, like those concerning personal attack and political editorializing upheld in Red Lion prevent the development of 'unlimited private censorship operating in a medium not open to all.'"
> NBC Br. at 31, quoting Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (emphasis in NBC Br.)

In the face of this statement, NBC's argument that particularity in the fairness doctrine would violate either Section 326 or the First Amendment is puzzling. The position finds no support in any authority. Red Lion upheld the requirements of the Commission's personal attack rules. Unlike the present vague standards of the general fairness doctrine, the rules at issue in Red Lion leave almost no discretion in the licensee with respect to determination of the issue, the spokesman, etc., and they spell out the exact procedure to be followed in the event of a personal attack. The Court specifically reserved the question

of whether the more generalized requirements of the fairness doctrine would pass muster. 395 U.S. at 395-396. It did, however, seem to express a preference for particularity over the "generalized 'public interest' standard" usually relied on by the Commission. 395 U.S. at 385-86.

1. Application of the Fairness Doctrine to Military Recruitment Ads is Neither Censorship nor an Infringement of Speech

In Banzhaf, this Court suggested that the statutory prohibition on censorship may amount to no more than a shorthand statement of the First Amendment. ____ App. D.C. at ____, 405 F. 2d at 1099. In discussing whether the cigarette ruling amounts to censorship, this Court recited a number of criteria. When these criteria are used to test the effects on speech and on Section 326 of an application of the fairness doctrine to military recruitment ads,[1/] it is apparent that there can be no constitutional defect in granting the relief sought by petitioners.

The first consideration noted by this Court is whether application of the fairness doctrine might have a "chilling effect" by making broadcasters reluctant to carry the ads because of the financial burden imposed by compliance with the fairness doctrine. ____ App. D.C. at ____, 405 F. 2d at 1101. But the

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1/Petitioners reiterate that they do not rely on Banzhaf to establish the applicability of the fairness doctrine to military recruitment ads. That issue has already been resolved. Supra, note 2, p. 5 . The analysis which follows in the text is for purposes of demonstrating that application of the fairness doctrine to these ads fosters free speech without violating the statutory prohibition on censorship as contended by NBC.

ads in question here are carried free by the licensees. Thus any chilling effect could be offset by simply devoting half or some reasonable proportion of the time now devoted to recruitment ads to opposing points of view. Thus there is no chilling effect because of the economic consequences of carrying opposing points of view.

There is a danger that the government might be deterred from running their ads because the presentation of views opposing the views promulgated by the ads would decrease the utility of these ads as recruitment devices. See ____ App. D.C. at ____, 405 F. 2d at 1102. But not only is this danger marginal, see Ibid., but it is somewhat irrelevant. The purpose of Section 326 is to prevent government censorship of speech; it is not designed to protect the government from self-censorship.

Even if some protected government speech is deterred, the gains to speech outweigh the losses. A primary policy of prohibiting censorship is

> "to foster the widest possible dissemination of information on matters of public importance. . . . [A]nd a debate in which one party has . . . sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.
>
> ". . .[W]here, as here, one party to a debate has . . . clout and a compelling . . . interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less that life itself -- we think the purpose of rugged debate is served, not hindered by an attempt to redress the balance."
> ____ App. D.C. at ____, 405 F. 2d at 1102-03.

And finally, the application of the fairness doctrine to these ads

> "does not repress any information, [but] serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the . . . ruling [sought by petitioners] does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about."
> ____ App. D.C. at ____, 405 F. 2d at 1103.

In the instant proceeding, petitioners do not seek to dictate the content of the opposing points of view. See supra at p. 13. And far from attempting to convert the media into a mouthpiece of the government, petitioners seek to do just the opposite by aiding the media to achieve a balanced stand with respect to a government policy.

2. The Commission's Reliance on the Licensees' Uncontrolled Judgments is a Prior Restraint on Speech in Violation of the First Amendment

Petitioners have described the Commission's cumbersome administration of the fairness doctrine and argued that the deference to the licensee's judgment constitutes a prior restraint on speech. NBC seeks to avoid this point by noting that all of the cases cited by petitioners involve statutory prohibitions on protected speech or conduct. But the absence of direct government interference is of no consequence. The dissenting opinion of Commissioner Johnson in Business Executives Move for a Viet-

nam Peace, 25 F.C.C. 2d 242, 253-59 (1970) sets forth a variety of reasons why state action standards are directly applicable to broadcast licensees. In any event, the Supreme Court has made clear that whether labelled state action or otherwise, a broadcast licensee cannot censor speech.

> "[A]s far as the First Amendment is concerned, those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. . . .
> . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."
> Red Lion, supra, 395 U.S. at 389-90 (emphasis added).

Thus the issue is not, as NBC would have it, "more government regulation", NBC Br. at 27 (emphasis in original) versus less government regulation. The issue is what is necessary to facilitate the maximum freedom of expression consistent with the congressionally mandated broadcasting scheme. And the freedom of expression with which the statute is concerned does not, as the Supreme Court stated in Red Lion, refer only to maximizing NBC's freedom of expression to the exclusion of others. What is necessary to maximize speech is a scheme that imposes the least burdens on those who seek to speak. Pet. Br. pp. 33-34. And a scheme where the person seeking to speak bears every burden of going forward and must meet unarticulated standards of proof patently burdens speech unnecessarily.

C. The Deference to the Reasonableness and Good Faith Standard Does Not Satisfy the Due Process Clause of the Fifth Amendment

Neither NBC nor the Commission contest petitioners' assertions that the Commission's delegation of authority to licensees in the fairness doctrine area must be pursuant to adequate guidelines. Pet. Br. at 24, 33-35. Resolution of the Due Process issue in this case is therefore dependent on this Court's disposition of the issues relating to the adequacy of the standards employed in resolving fairness doctrine complaints. But one point raised by both NBC and the Commission is worthy of note. Both suggest that the availability of court review is a substitute for meaningful standards controlling licensee discretion and governing action at the administrative level. F.C.C. Br. at 15, n.15; NBC Br. at 34. Petitioners are at a loss to understand these arguments. They seem to mean that so long as court review is available to correct transgressions, agencies and their regulatees are free to roam at will. While some would contend that this is in fact the philosophy that has guided the Commission and its licensees, it is a strange argument for parties who come before this Court asking it to defer to their good faith and reasonableness. It is an especially strange argument where valuable First Amendment rights are at stake.

IV. Petitioners Were Not Required to Seek Reconsideration Since the Commission's Lack of Opportunity to Rule on Certain Matters is a Result of its Failure to Follow its Own Procedures and Procedural Infirmities Arising From its "Informal" Relation with Intervenor.

Both the Commission and NBC argue that petitioners should have sought reconsideration. NBC raises its argument in the context of attempting to defend its one-sided "informal" presentation of evidence to the Commission.[1/] It argues that this violated no Commission Rule[2/] and that it was not obligated to serve it upon "third parties". In any event, continues NBC, the evidence did not in any way affect the outcome of this proceeding. NBC Br. at 25.

1/Petitioners did not state, as NBC claims, "that they were not aware of any communication between NBC and the Commission until they examined the record" in this case. NBC Br. at 22 (emphasis added). Petitioners were aware that there had been a "communication", for as NBC notes the Commission referred to it in its opinion in this matter. Petitioners stated that they were not aware of the "letter of April 16th" until the record was delivered to this Court. Pet. Br. at 6-7, n.**.

2/Petitioners did not, as NBC argues, NBC Br. at 24, contend that this contact was a direct violation of Section 1.1241 of the Commission's Rules or of the Administrative Procedure Act. Petitioners call attention to the fact that the citation of these rules was preceded by "cf." As defined in A Uniform System of Citation 87 (11th ed. 1967), "cf." preceding a cited authority means that the

> "[c]ited authority supports a statement, opinion, or conclusion of law different from that in text but sufficiently analogous to lend some support to the text."

Nor did petitioners allege, as NBC argues, NBC Br. at 24, n.17, that the failure to hold a hearing is an error in the proceedings below. Petitioners merely recited, in accordance with Rule 28(a)(3) of the Federal Rules of Appellate Procedure, the course of the proceedings below.

These arguments sound hollow indeed coming from NBC, the licensee who protests throughout its brief in this Court that it is sufficient for the Commission and this Court to rely on its "good faith" in resolving fairness complaints. Its good faith (and reasonable judgment one might add) extends to regarding a complaining party as a "third party" when NBC presents evidence involving the subject of the dispute to the adjudicating body.[1/] And it is plain that this evidence not only affected the outcome of this proceeding, but was determinative. J.A. at 35, F.C.C. Br. at 1, 23.[2/]

Whatever the letter of the Commission's Rules, see note 2, p. 24, supra, it is, as the Supreme Court noted in another

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1/Equally indicative of NBC's good faith and reasonable judgment is its innuendo that counsel for petitioners was also engaging in the "informal" presentation of evidence. NBC Br. at 23, n.16. Counsel for petitioners specifically requests that this Court examine the correspondence in question. It appears at J.A. 15-16. Petitioners' counsel sent copies of WRC's letter to respondent along with a letter of transmittal. The text of the latter is as follows:

> "At your request I am sending you copies of the letter to Professor David Green from WRC-TV in response to his request that WRC broadcast a spot announcement."
>
> I hope the enclosed copies will be adequate.

Thus petitioners' counsel provided the Commission with no more than a copy of a letter written by NBC.

By contrast, Mr. Monderer of NBC wrote a letter that contained three paragraphs of new information of which petitioners were unaware. For NBC to equate its letter with that of petitioner's in this Court shows something less than good faith.

2/Although the Commission relies on the NBC letter, it does not really deal with the issue raised by NBC's informal submission except to note that it was submitted in response to the Commission's request. F.C.C. Br. at 9, n.10.

context, hardly compatible with "traditional notions of fair play and substantial "justice", Milliken v. Meyer, 311 U.S. 457, 463 (1940), for a party to a proceeding to first present evidence without informing the other party to the proceeding and then argue that the latter bears the burden of the former's transgressions. In short, equity commands that NBC be estopped from now attempting to block petitioners' relief in this Court.

Nonetheless NBC argues that petitioners, having failed to raise the issue of NBC's informal submission before the Commission, may not raise it on review. But as has been noted, note 1, p. 24, supra, petitioners were not aware of the evidence submitted by NBC until the Commission issued its decision in this matter. Thus the cases cited by NBC, NBC Br. at 23, are inapposite. For in those cases, the parties had been accorded the opportunity to respond to all evidence and raise all legal arguments before the agency.

The F.C.C. argues that petitioners have raised new evidence and legal arguments before this Court upon which the Commission has had no opportunity to pass. F.C.C. Br. at 11-12. Citing a few cases for the proposition that the reviewing Court cannot

> ". . . set aside an administrative determination upon a ground not theretofore presented and deprive the Commission of an opportunity to consider the matter . . .,"
> Id. at 12,

the Commission suggests that petitioners are precluded from elaborating upon points and authorities raised in their complaint.

However, all of the cases cited by the F.C.C., with one exception,[1/] involved extensive hearings. In Florida Gulfcoast Broadcasters, Inc. v. F.C.C., 122 App. D.C. 250, 352 F.2d 726 (1965) for example, the authority upon which the Commission relies for its principle of law, the court refused to consider an issue never raised "at any level before the Commission during the seven years of hearings and pleadings before that agency . . ." Id. at 727 (emphasis supplied).

In the instant case, there was no opportunity for petitioners to ever expand upon the evidence and arguments raised in their complaint. After filing of petitioners' formal complaint there were no further pleadings. The Commission never informed petitioners that it was going to decide this issue on a single pleading. The Commission does not contest petitioners' assertion that this is a departure from its usual practice in fairness complaints.[2/] Pet. Br. at 36. Instead it argues that its self-imposed choice to deny itself all relevant information and argument should bar petitioners from raising these issues on review. Accepting the Commission's reasoning and procedure herein would require that a fairness complaint be a complete record unto itself.

1/ In Presque Isle T.V., et. al. v. U.S., 387 F.2d 502 (1st Cir. 1967), where there evidently was no hearing, the issue of the Commission's jurisdiction in CATV cases was raised for the first time on review. Petitioners have not attempted to raise so fundamental an issue herein for the first time. Petitioners have only cited support for allegations made in the complaint. Presque Isle T.V. is, therefore, like the other cases cited by respondent, inapposite to the case at bar.

2/ In Business Executives Move For a Vietnam Peace v. F.C.C., No. 24,492, pending in this Court, there were no less than 13 exchanges of correspondence, several of them quite lengthy, between the parties and the Commission. Parenthetically it should be noted that all parties were sent carbons of every letter by all other parties.

In any event, a reviewing court will not hesitate to consider new evidence and arguments where a denial to do so would result in injustice. Hormel v. Helvering, 312 U.S. 552, 557 (1941); Blair v. Oesterlein Machine Co.; 275 U.S. 220, 225 (1927); Board of Public Instruction of Taylor Cty., Fla. v. Finch, 414 F.2d 1068, 1072 (5th Cir. 1969). And where important constitutional rights are at stake, a reviewing court is always a proper forum for consideration. Zwickler v. Koota, 389 U.S. 241 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

If the F.C.C. seriously wanted to consider the arguments plainly raised in petitioners complaint, it could have requested responsive pleadings or made formal inquiries to the parties. In the absence of such diligence, the Commission is precluded from denying petitioners the right to develop their arguments on review. Such denial would result in a severe injustice which this Court should not countenance.

V. The Commission's Order Should Be Reversed

Petitioners assertions with respect to the administrative conduct of this case remain. But there is now an additional factor. The F.C.C. sought and obtained from this Court an extension of time that has delayed resolution of this case by about a month and a half. A remand would entail additional lengthy delay. In the meantime, First Amendment rights slip irretrievably away; with them go the lives of our youth.

Conclusion

For all the foregoing reasons, petitioners respectfully request that this Court grant the following relief:

a) Reverse the Commission's Order of June 4, 1970, finding that stations WMAL-TV and WRC-TV had fulfilled their obligations under the fairness doctrine, the public interest standard, and the First and Fifth Amendments to the Constitution; and

b) Order the Commission to order WMAL-TV and WRC-TV to carry announcements opposing the desirability of regular military service.

Respectfully submitted,

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